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I. INTRODUCTION

Every beer lover has that mythic bottle or can. The one she drove 2,000 miles and waited in a line wrapped around a building to acquire. If she is lucky, it is an imperial stout that will sit, resting comfortably in her basement to be brought out and celebrated in years to come. If she is lucky, but somewhat more pressed for time, it is a case of fresh-hopped IPAs that must be kept on ice and enjoyed post haste. Maybe she sent her husband on a trip across four states to buy beer that is only sold in the state of Wisconsin.[1] Beer lovers will go to great lengths to drink their favorite beers.

Beyond the usual difficulties of ramping up production, like finding the capital to expand facilities and hire more workers, many breweries make the choice not to distribute their beer more widely because state laws and regulations have made it unattractive to do so by requiring brewers' trust in their distributors to be near-absolute. State beer franchise statutes make it nearly impossible for brewers to terminate their relationships with distributors or to have a say when distributors want to "break up" and sell their distribution rights to a new distributor, even a distributor the brewer despises. Brewers must have faith that two hearts will beat as one for the duration of their relationship. This Article examines the way these statutory frameworks, and brewers' reactions to them, collided to keep one of the author's favorite beers—Bell's Two Hearted IPA—out of the hands of consumers in the United States.

This Article will primarily focus on one, recently resolved, dispute: the decision by Bell's Brewery to cease shipping beer to all of its distributors in Virginia in protest of one distributor's choice to sell itself (and, with it, the

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1. To put readers out of their misery (and in a pointless attempt to establish credibility since I am probably already behind the times in terms of my beer hipness), these beers are Three Floyds Dark Lord, The Alchemist Heady Topper, and whatever beers from New Glarus my husband could get his hands on.

distribution rights to Bell's Brewery's beer) to a distributor Bell's Brewery disliked. Although Virginia is more generous than many states in allowing brewers any say at all in such a transfer of rights, Virginia's beer franchise statute still very much favors the rights of distributors over brewers.[2] Bell's Brewery's distributor disagreement dispute, and the following rounds of administrative procedures and litigation, kept its beer off shelves in Virginia for nearly two years.[3]

This Article's focuses on the relational aspects created by beer franchise statutes that lead to conflict. As an alternative dispute resolution professor and mediator, the author's focus is often on the sources of conflict in relationships and beer franchise statutes. Although designed (at least in part) to protect distributors from bad behavior by brewers, beer franchise statutes have shifted the locus of control so far in favor of distributors that brewers are understandably reluctant to give up control by expanding beyond self-distribution. Bell's Brewery's dispute with mega-distributor Reyes Holdings, LLC ("Reyes"), and a few other disputes discussed along the way, will illustrate the frustrations that beer franchise statutes cause, but also suggest that some of the concerns that led to the creation of these statutes in the first place are still very much in play in the dynamics between brewers and distributors.

This Article concludes by looking at changes like lowering the self-distribution limits for brewers, providing more opportunities for termination, giving guidance about buy-outs should brewers wish to terminate, and encouraging further changes along these lines throughout the country. Such changes will give brewers more choice in whether or not to enter into relationships with distributors and more certainty that should they wish to end a relationship they can do so without years of litigation.

II. The Three-Tier System and the Rise of Beer Franchise Statutes

Other articles in this Symposium will undoubtedly go into greater detail about the three-tier system of distribution, but a brief primer is helpful to situate distribution statutes and their role in creating—rather than alleviating—disputes between brewers and distributors. The United States made a decision at the end of Prohibition to make alcohol intentionally difficult to procure, thus ending Prohibition but continuing to promote many of the goals of the temperance movement.[4] In different ways throughout the country, government officials have attempted to put gates up in the supply and purchase of alcohol.

2. *See infra* notes 22–25 and accompanying text. This Article uses the term "franchise statutes." Other articles might refer to them as beer distribution statutes.

3. Karri Peifer, *Two Hearted Ale and All Bell's Beer Should Be Headed Back to Richmond – for the First Time in Nearly Two Years*, RICHMOND TIMES DISPATCH, Nov. 5, 2020.

4. Marcia Yablon, *The Prohibition Hangover: Why We Are Still Feeling the Effects of Prohibition*, 13 VA. J. SOC. POL'Y & L. 552, 552 (2006).

After the Twenty-first Amendment was passed and ratified in 1933, the sale of alcohol was once again legal in the United States, and states were given a large degree of control over alcohol in their respective jurisdictions.[5] States had to come up with their own plans for how the production and distribution of alcohol would work within their borders, and most adopted a version of the "three-tier system" in which manufacturers, wholesale distributors, and retailers each formed a separate step of the system and in which vertical integration—i.e., ownership of each tier by a common entity—was prohibited.[6] As part of this system, states mandated that breweries sell their beer to wholesale distributors, who then sell the beer to retailers like liquor stores, bars, and restaurants.[7]

Statutes governing the relationships between brewers and distributors vary from state to state. But just as the three-tier system of distributing alcohol is near-universal throughout the United States, so too are the basics of the rules around how brewers and distributors must work together. Broadly speaking, beer franchise statutes are designed to protect distributors rather than brewers, and many of these statutes express goals such as protecting the health of the population by discouraging overconsumption. These statutes sometimes specifically address the perceived power imbalances between brewers—typically understood to follow the big brewery model of the 1970s—and distributors who have traditionally been local mom-and-pop shops.[8] While this model may have accurately reflected the beer industry at some point in the twentieth century, it has been criticized as a poor fit for today, when thousands of small brewers have proliferated throughout the United States.[9]

While not all state beer franchise statutes have the same requirements, there are some elements that most of them share. Most require that brewers grant distributors an exclusive geographic territory; have state-based choice of law and forum selection; give notice and cure rights that are generous to distributors; make it easy for distributors to transfer their distribution rights to products to other distributors; and make it nearly impossible for brewers to terminate or

5. *See* U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.").

6. Some states maintained prohibition (Kansas, Mississippi, and Oklahoma) and those that allowed alcohol varied on the degree of intervention by the state itself in the sale of alcohol, with some states controlling the retail end directly (often called monopoly states) and others licensing the right to sell alcohol to retailers. *See* Daniel Croxall, *Independent Craft Breweries Struggle Under Distribution Laws that Create a Power Imbalance in Favor of Wholesalers,* 12 WM. & MARY BUS. L. REV. 401, 405 (2020).

7. In Michigan, liquor stores or convenience stores that sell alcohol are often called "party stores."

8. *See, e.g.*, Croxall, *supra* note 6, at 407; Marc. E. Sorini, *Beer Franchise Law Summary*, BREWERS ASS'N (2014), https://www.brewersassociation.org/wp-content/uploads/2015/06/Beer-Franchise-Law-Summary.pdf (on file with the *University of the Pacific Law Review*).

9. *See, e.g.*, Croxall, *supra* note 6, at 407–08; Brian D. Anhalt, Comment, *Crafting a Model State Law for Today's Beer Industry*, 21 ROGER WILLIAMS U. L. REV. 162 (2016); *cf.* Roni A. Elias, *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After* Granholm, 14 DEPAUL BUS. & COM. L.J. 209, 225 (2015). Law students seem especially intrigued by state beer franchise statutes.

refuse to renew their distribution contracts. Most states that do allow termination by brewers require "good cause," and those that do allow termination typically require brewers to compensate the distributor. Good cause may be something like the insolvency of the distributor.[10] Simply being bad at actually distributing the product or seeming to promote one client's products over another's products is not cause for termination. As an alcohol industry specialty blog puts it, "The question suppliers generally ask when entering a franchise state is: Can they do anything to protect themselves if they want to later terminate the relationship with the distributor?"[11]

Even prior to Prohibition, market pressures were leading to consolidation in the brewing industry, with innovations like refrigeration allowing bigger breweries to distribute their beer more widely.[12] The number of breweries around the country was not at an all-time low at the end of Prohibition. Some breweries had pivoted to manufacturing other beverage products and were able to return to producing beer relatively quickly.[13] However, many states' decisions to forbid breweries to directly sell to retailers presented a steeper hurdle for smaller breweries.[14] By the late 1970s, there were only eighty-nine breweries owned by forty-two companies remaining in the United States. Some experts predicted that by the 1980s, there would only be five brewing companies left in the United States.[15] This industry consolidation created an environment where a small number of giant brewers were well-positioned to exert their influence over much smaller distributors. Beginning in the 1970s, states passed franchise laws to help protect state-based distributors.[16]

It is important to recognize that many brewers appreciate and value their distributors, and many make the voluntary choice to remain small enough that they do not need to use a distributor. In markets for consumable goods, wholesalers are an important part of the supply chain. It often does not make sense for manufacturers, especially small ones, to have to take on the responsibility of getting their products onto retail shelves when there are companies that can perform these services for them. While the ability to have customers order online makes it easier for producers of all kinds to coordinate the sale of their products, regulatory issues aside, it is still very difficult to properly

10. *See infra* note 23 and accompanying text for a comparison of good cause termination language in Michigan and Virginia.

11. Ryan Malkin & Ashley Hanke, *How to Do Business in a Franchise State*, SEVENFIFTY DAILY (Oct. 22, 2018), https://daily.sevenfifty.com/how-to-do-business-in-a-franchise-state/ (on file with the *University of the Pacific Law Review*).

12. Natasha Geiling, *What Caused the Death of American Brewing?*, SMITHSONIAN MAG. (Aug. 1, 2013), https://www.smithsonianmag.com/arts-culture/what-caused-the-death-of-american-brewing-21155872/ (on file with the *University of the Pacific Law Review*).

13. *Id.*; DANIEL OKRENT, LAST CALL: THE RISE AND FALL OF PROHIBITION (2011).

14. Geiling, *supra* note 122.

15. *Id.*

16. Malkin & Hanke, *supra* note 11.

package and ship a product like beer.[17] Unsurprisingly, there is considerable confusion on the part of brewers, particularly smaller breweries, as they try to navigate distribution networks, and businesses have sprung up to try to help.[18]

Moreover, many breweries choose to stay small by choice, and there are many reasons that brewers might want to limit their distribution. Small brewers only make so much beer, and so it might not make sense for them to sell it beyond their own doors. Many brewers emphasize the importance of freshness and handling of their beers and want to maintain as much control over their product as possible. Self-distribution, whether through on-site-only sales or maintaining control over delivery, allows brewers to keep a closer eye on their beer.

The main issues with state distribution laws lie in the compulsory nature of these brewer–distributor agreements that strip brewers of equal control over the relationship once they have signed on with a distributor. Once a brewer and distributor enter into a distribution agreement, they are locked into doing business with one another until one or the other ceases to do business or the distributor transfers its right to carry the brewer's beer to another distributor. These laws also discourage or prohibit brewers from influencing to whom the rights to their beer are transferred. For brewers who wish to withdraw from a distributor relationship and are unable to convince their distributor to transfer their rights to a more desirable distributor partner, the only option is often to cease distributing entirely in a jurisdiction.

For purposes of illustration, let us compare the beer distribution statutes from two states: Michigan, the home state of Bell's Brewing, and Virginia, the state that Larry Bell pulled his business out of when one of his distributors attempted to sell Bell's Brewery's business to a distributor that did not meet Bell's approval.[19]

Michigan's franchise statute begins with a preamble explaining why legislators felt "regulation in this area is considered necessary," including to "maintain stability and healthy competition," maintain the three-tier system, and "promote public health, safety, and welfare."[20] Virginia's statute goes straight from definitions into limitations on brewers' behavior.[21] Both require that

17. By way of example, Speciation Artisan Ales is a brewery located in Western Michigan in the city of Grand Rapids. It self-distributes its beer via a web store in which customers can place an order online early in the month and then mid-month the brewery hand delivers beer to purchasers.

18. *See, e.g.*, *Beer Distribution Rules*, SOVOS SHIPCOMPLIANT, https://www.sovos.com/shipcompliant/resources/beer-distribution-rules-by-state (last visited Mar. 22, 2021) (on file with the *University of the Pacific Law Review*) (helping brewers manage interstate distribution networks); *Sell Your Beer*, TAVOUR, https://www.tavour.com/sell-your-beer (last visited Mar. 15, 2021) (helping brewers to distribute in states that allow direct shipment of beer by mail).

19. For a broader discussion of beer franchise statutes, *see* Croxall, *supra* note 7, at 418–24; Barry Kurtz & Bryan H. Clements, *Beer Distribution Law as Compared to Traditional Franchise Law*, 33 FRANCHISE L.J. 397 (2014); Sorini, *supra* note 8.

20. MICH. COMP. LAWS § 436.1403(1) (2021).

21. VA. CODE. ANN. §§ 4.1-500 to -502 (2021).

distributors be granted an exclusive territory. Both states have "good cause" requirements for termination of a distribution agreement. In Michigan, the brewer must show a failure by the distributor to "comply with a provision of the agreement which is both reasonable and of material significance to the business relationship."[22] In Virginia, good cause is determined by the Virginia Alcoholic Beverage Control Authority ("Virginia ABC") and can also include a distributor's failure to "substantially comply with reasonable and material requirements."[23] The Virginia statute is much more detailed than most in the guidance it gives for determining causes for termination by brewers, including a focus on maintaining sales volume of product.[24] Notably, Virginia also requires a brewer's reasonable consent to the transfer of a distributor's product rights to another distributor. This reasonable consent requirement is more favorable to brewers than is seen in most franchise statutes, which rarely even require notice to brewers prior to the transfer of rights to distribute their beer.

Although good cause may seem to give brewers a way to extricate themselves from bad distributor relationships, in practice it is very difficult to prove that good cause exists outside of an event like the insolvency of the distributor. Proving good cause ends up requiring years of administrative procedures and litigation.

III. BREWERIES STILL TRY TO CONTRACT AROUND FRANCHISE STATUTES

Even with the strict rules in place in most states governing the relationship between brewers and distributors, breweries—especially large ones—still try to use their bargaining leverage to extract favored terms and behavior from distributors, both at the contracting stage and in the everyday performance of distributors' roles promoting and placing brewers' products.[25] This Part briefly examines a few relatively recent cases to situate some of the conduct by breweries that concerns both distributors and smaller breweries. These cases suggest that one primary contractual mechanism that breweries try to include to

22. MICH. COMP. LAWS § 436.1403(8)(a) (2021). The Michigan statute uses the UCC definition of good faith, "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." MICH. COMP. LAWS § 436.1403(2)(d) (2021).

Virginia also requires good faith along with reasonableness. VA. CODE. ANN.§ 4.1-517 (2021). The statute even requires that parties show good faith efforts to resolve their dispute before bringing a complaint before the Virginia ABC. VA. CODE. ANN.§ 4.1-509.1 (2021).

23. VA. CODE. ANN. §§ 4.1-505, -506 (2021).

24. The statute provides: "In any determination as to whether a wholesaler has failed to substantially comply, without reasonable excuse or justification, with any reasonable and material requirement imposed upon him by the brewery, consideration shall be given to the relative size, population, geographical location, number of retail outlets and demand for the products applicable to the territory of the wholesaler in question and to comparable territories." VA. CODE. ANN. § 4.1-505 (2021).

25. Despite the potential for conflict, very few disputes between brewers and distributors have reached the point of fully adjudicated legal disputes. That is hardly surprising in an era when a miniscule amount of civil lawsuits are resolved by a court, but it does make it difficult to find much precedent about how franchise statutes will be enforced by courts.

block sales of their distribution rights—a right of first refusal of the sale of those rights—is unlikely to be enforced in states with beer franchise laws. However, breweries may be able to afford themselves some contractual protection by granting narrow rights to their distributors that only apply to a fixed list of a brewery's beers.

One way brewers might try to prevent the transfer of their accounts to distributors they dislike is by building in a refusal right into their contracts. Such language, even if carefully worded, runs the risk of violating franchise statute requirements that brewers not unreasonably withhold their consent to the transfer of rights from one distributor to another. For example, an attempt by Anheuser-Busch InBev ("AB") to put a "match and redirect" provision in its beer distributor contract drew the ire of the Mississippi Supreme Court when AB used the provision to redirect the sale of the rights to carry AB's beer by then-distributor Rex away from Adams Beverages (Rex's intended purchaser) and to Mitchell—a distributor who had indicated its willingness to refuse to carry AB's largest craft beer rival, Yuengling.[26] The contract provision at issue provided:

> If Anheuser-Busch disapproves a proposed owner in Wholesaler's business solely because of (A) concern with the resulting Territory configuration or (B) market combinations to achieve economies of scale or enhanced sales opportunities, and if a sale is eventually completed to a party preferred and designated by Anheuser-Busch, then Anheuser-Busch shall ensure that the selling Wholesaler receives the same price, net of taxes, Wholesaler would have received from the disapproved purchaser.[27]

Rex and Adams had agreed that Adams would pay a price based on each

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26. Rex Distributing Co. v. Anheuser-Busch, 271 So. 3d 445, 451 (Miss. 2019).

Yuengling is as close as craft beers come to challenging Budweiser. A 2019 study by Nielsen showed Yuengling's Amber Lager as having by far the largest share of the Independent Craft beer market, with 9.3% of dollars spent on craft beer. Other notable craft beers carried a much smaller percentage of the "dollars spent" market: for example, Sierra Nevada Pale Ale (3%%), Sam Adams Boston Lager (1.8%), New Belgium Fat Tire (1.8%), and Bell's Two Hearted (1.3%). Nielsen Craft Beer Scan Sales Snapshot for the Brewers Association. Available through the Brewers Association.

Perhaps to provide it with more backup when other breweries try to shoulder it out of jurisdiction, in 2020 Yuengling and Molson Coors announced that they were forming a joint venture in which Yuengling would be brewed and packaged at Molson Coors' breweries. Christopher Doering, *Molson Coors Forms Joint Venture with Yuengling to Brew and Sell Its Beers*, FOOD DIVE (Sept. 16, 2020), https://www.fooddive.com/news/molson-coors-forms-joint-venture-with-yuengling-to-brew-and-sell-its-beers/585252/ (on file with the *University of the Pacific Law Review*).

This agreement arguably will allow Yuengling to maintain its official status as an independent, craft brewery while taking advantage of the distribution chain advantages of a conglomerate like Molson Coors. There is also an interesting question about whether this structure was put in place to try to take advantage of language in some states that allows "successor manufacturers" to terminate existing distribution agreements. *See, e.g.*, Beverage Distribs., Inc. v. Miller Brewing Co., 690 F.3d 788, 790, 795 (6th Cir. 2012); Frederick P. Winner, Ltd. v. Pabst Brewing Co., No. 1882, 2021 WL 302668 (Md. Ct. Spec. App. Jan. 29, 2021).

27. *Rex Distributing Co.*, 271 So. 3d at 451.

individual distribution contract Rex successfully transferred to Adams. When AB refused to grant permission for its rights to be transferred to Adams, Rex claimed it lost out on $3.1 million in the sale to Adams and that AB's refusal was in violation of the Mississippi beer franchise statute that provided a brewery's consent "shall not be withheld or unreasonably delayed."[28] Because the issue being raised on appeal was the trial court's dismissal of Rex's claims under the Mississippi beer franchise statute, the Mississippi Supreme Court did not ultimately opine that AB had violated the statute, but the Court's reasoning certainly suggested that AB's contractual language served as an end-run around the statute by allowing AB to choose the owners of its wholesalers.[29] In the same opinion, the Court upheld the trial court's dismissal of Rex's contract claims, effectively limiting Rex's damages to those found in Mississippi's beer franchise statute that allows for "reasonable compensation for the diminished value of a wholesaler's business."[30]

Other big brewery conglomerates have taken similar steps to contractually limit their distributors' abilities to transfer distribution rights to their beers. In 2012, MillerCoors (now Molson Coors)[31] attempted to block the sale of rights to its portfolio from its then-distributor, Chesbay Distributing Company, to the Reyes distribution group. MillerCoors claimed that its contract with Chesbay prevented the transfer of the MillerCoors distribution rights because Chesbay was obligated to inform MillerCoors of any proposed sale, and MillerCoors had a right of first refusal to match the sales price.[32] In the litigation, Reyes, the purchaser of Chesbay Distributing, pointed out that MillerCoors had included a savings clause in its distributor contracts and had asserted to the alcohol authorities in a number of states that state statutes would supersede in the event of any conflicts with the language of MillerCoors' distributor agreements.[33] Indeed, Michigan's Liquor Control Commission had previously held that such a right of first refusal for the transfer of distribution rights or the sale of the distributor ran afoul of Michigan's franchise statute that prohibited suppliers from having a financial interest in the business of wholesalers.[34] In this case,

28. *Id.* at 448.

29. *Id.* at 451.

30. MISS. CODE ANN. § 67-7-15 (2021).

31. In 2016, SAB Miller merged with AB InBev and was required by regulators to sell its stake in MillerCoors, establishing Molson Coors and AB InBev as the current two brewing giants in the U.S. Market. Jim Koch, Opinion, *Is It Last Call for Craft Beer?*, N.Y. TIMES, Apr. 7, 2017.

32. MillerCoors LLC v. Chesbay Distrib. Co., No. 3:12-cv-00659-HEH, 2012 WL 4462720, at ¶ 38 (E.D. Va. Sept. 12, 2012).

33. Memorandum in Support of Reyes Holdings, LLC's Motion to Intervene under Rule 24 at 4–5, MillerCoors v. Chesbay Distrib. Co., No. 3:12-cv-00659-HEH, 2012 WL 4462720 (E.D. Va. Sept. 12, 2012), 2012 WL 6676617 [hereinafter Reyes Memorandum].

34. *See* Mich. Beer & Wine Wholesalers Ass'n, Mich. Liquor Control Comm. (Mar. 4, 2009), https://www.alcohollawreview.com/wp-content/uploads/2012/09/MC-Declaratory-Ruling1.pdf (on file with the *University of the Pacific Law Review*).

The Michigan Liquor Control Commission also made clear that 1) Michigan law applied to the distribution however, the courts never reached the question of whether Virginia's beer franchise statute allowed a right of first refusal, as the parties eventually settled out of court and after which Reyes completed its purchase of Chesbay at the end of 2012.[35]

One potential area of success for beer makers is a very narrow drafting of the rights they grant to distributors. Although most states require that distributors have exclusive rights to carry beers in a specified geographic area, MillerCoors, at least, has had success in only granting a distributor rights to expressly identified beers, allowing MillerCoors to assign distribution rights in later-created beers to other distributors. One of MillerCoors' Pennsylvania distributors, Frank B. Fuhrer Wholesale, alleged that MillerCoors' decision to have Fuhrer's competitors distribute three new lines of beer violated MillerCoors' distribution agreement with Fuhrer.[36] However, the court found that because MillerCoors had included an "Exclusive Distribution List" in its agreement with Fuhrer, having new beers carried by other distributors did not violate MillerCoors' contract.[37] This kind of specificity is probably of more use to breweries that carry a relatively uniform list of beers that does not change frequently. A drafting choice like this might make less sense for a brewery that rotates its offerings seasonally with new brews. However, it might allow a brewer to cease distributing the enumerated beers while sending new offerings to other distributors in a state.[38]

These kinds of cases show efforts by the largest breweries in the United States to try to contract around the distributor-friendly language found in state distribution statutes. These contractual fixes have been met with only limited success, particularly with regards to terminating or influencing the sale of distribution agreements. This shows that the statutes largely work in limiting the ability of larger breweries to use their leverage to bully distributors, but they also limit the control any brewer will have after the end of the relationship with a distributor.

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agreement, 2) MillerCoors could not require distributors to submit financial statements, 3) MillerCoors could not require that distributors add MillerCoors to their liability insurance, 4) MillerCoors could not have approval rights over a distributor's management.

35. *See* MillerCoors' Opposition to Chesbay's Motion to Dismiss, MillerCoors LLC v. Chesbay Distrib. Co., No. 3:12-cv-00659-HEH, 2012 WL 4462720 (E.D. Va. Sept. 12, 2012), 2012 WL 6676616; Joint Stipulation of Dismissal with Prejudice, MillerCoors LLC v. Chesbay Distrib. Co. No. 3:12-cv-00659-HEH, 2012 WL 4462720 (E.D. Va. Sept. 12, 2012), 2012 WL 6676596; Press Release, Reyes Holdings, Reyes Beverage Group Acquires Chesbay Distributing Company (Dec. 1, 2012), https://www.reyesholdings.com/news/reyes-beverage-group-acquires-chesbay-distributing-company (on file with the *University of the Pacific Law Review*).

36. Frank B. Fuhrer Wholesale Co. v. MillerCoors LLC, 602 Fed. Appx. 888 (3rd Cir. 2015).

The distributor suggested that MillerCoors' decision was retribution for the distributor also carrying Anheuser-Busch Products. *Id.* at 890.

37. *Id.*

38. As discussed below, when Bell's has attempted to terminate a relationship with a distributor, it has ceased doing business entirely within a state. *See infra* Part III.

IV. LARRY BELL: THE BREWER WHO FIGHTS BACK

Few breweries seem willing to spend the time and money to fight distribution regimes. But among craft brewers, Larry Bell is one who is willing to fight. Bell's Brewery is one of the largest independent craft breweries in the country. As of July 2020, Bell's Brewery has distributed to forty-two states, Washington D.C., and Puerto Rico.[39] Its founder, Larry Bell, has a history of being an outspoken proponent of independent craft brewing and a critic of craft breweries that align themselves with brewery conglomerates.[40] He is vocal about his belief that big breweries try to outmuscle craft breweries in the competition for shelf space.[41] He is certainly not the only craft brewer to mistrust "Big Beer," as it is commonly called.[42] This mistrust can flow from Big Beer to distributors affiliated with Big Beer, since most distributors become known for aligning themselves with AB InBev (the "red house") or Molson Coors (the "blue house").[43] Like Bell's Brewery, Reyes is a business that started small but has become a giant.[44] Reyes now claims to be one of the largest distributors and one of the largest privately held companies in the country.[45] It is considered to be a blue house (a fact that it brought up in the earlier-discussed attempt by MillerCoors to block Reyes's purchase of Chesbay) and is continuing to consolidate by buying up smaller, local distributors.[46] If there is a distributor

39. Kayla Miller, *Bell's Brewery Expands Beer Distribution to 42nd State: Oklahoma*, MLIVE (July 30, 2020), https://www.mlive.com/news/kalamazoo/2020/07/bells-brewery-expands-beer-distribution-to-42nd-state-oklahoma.html (on file with the *University of the Pacific Law Review*).

40. In a 2018 article announcing that Founders Brewing Co. had surpassed Bell's as the largest brewery in Michigan, Larry Bell observed, "We're the largest craft brewery in Michigan. Mahou (San Miguel) had always been a bigger brewery than us. . . . We're not really into giving up our ideals to chase volume." Founders had sold a 30% stake of the brewery to San Miguel. *See* Robert Allen, *Founders Surpassed Bell's as Largest Michigan Brewery*, DET. FREE PRESS (Jan. 19, 2018, 5:52 PM), https://www.freep.com/story/entertainment/2018/01/19/founders-bells-largest-michigan-brewery/1049034001/ (on file with the *University of the Pacific Law Review*).

41. Brad Devereaux, *Larry Bell Has No Plans to Hire Bell's Brewery CEO After Daughter Departs*, MLIVE (Jan. 30, 2019), https://www.mlive.com/news/kalamazoo/2018/07/larry_bell_says_its_not_about.html (on file with the *University of the Pacific Law Review*) ("We're not the new shiny toy in the box, which there are thousands of right now, but then on the other side of the equation, you've got the big breweries who have bought up crafts, who are trying to muscle us off the shelves.").

42. *See* Zahr K. Said, *Craft Beer and the Rising Tide Effect: An Empirical Study of Sharing and Collaboration Among Seattle's Craft Breweries*, 23 LEWIS & CLARK L. REV. 355, 364 (2019) (discussing "cohesion around a common enemy: 'Big Beer,' or the multinational beverage conglomerates that dominate the field globally and engage in mass production.").

43. Bryan Roth, *Distress in Delivery, Pt. 1 – Why Distributors Need to Adapt*, GOOD BEER HUNTING (Mar. 7, 2018), https://www.goodbeerhunting.com/sightlines/2018/3/7/distress-in-delivery-pt-1-why-distributors-need-to-adapt (on file with the *University of the Pacific Law Review*). In an opinion piece in the New York Times, Jim Koch, the founder of Boston Beer Company, claimed that in most local markets, over 90 percent of the beer is controlled by distributors for either AB InBev or MillerCoors (now Molson Coors). Koch, *supra* note 311.

44. Croxall, *supra* note 6, at 40.

45. Reyes Memorandum, *supra* note 33, at 5.

46. Kate Bernot, *Stuck in the Middle with Who?, Pt. 1 – What Reyes' Massive California Footprint*

equivalent to Big Beer, it is Reyes.

Larry Bell has been fighting to avoid being distributed by Reyes for nearly twenty years. In 2006, Bell's Brewery decided to cease selling beer in the entire state of Illinois when the company's then-distributor, National Wine and Spirits, sold the rights to Bell's Brewery's beer to Chicago Beverage Systems, a Reyes-owned distributor.[47] At the time, Bell claimed that Illinois made up 11% of his total sales and referred to the decision to sell his rights against his will as "malarkey."[48] He also offered Illinois patrons who wanted his beer a 15% discount if they drove to Michigan to pick it up, calling it his "bootlegger's special," a feat relatively easy to accomplish since the drive from Chicago, Illinois to Kalamazoo, Michigan is a mere three hours.[49] Two years later, Bell's was back in Illinois, having signed up with a number of smaller distributors in the state.[50] Although National had threatened to sue Bell if he began distributing in the state with another distributor, National ceased to distribute beer in Illinois, and so Bell felt comfortable re-entering the market.[51]

A similar scenario began to play out in Virginia. In October 2018, Premium Distributors, another subsidiary of Reyes, contracted to buy out Bell's Brewery then-distributor, Loveland. Bell's Brewery sought to block the transfer of its rights from Loveland to Reyes. In the beginning of 2019, Bell's Brewery announced that it was no longer taking orders from any of its distributors in Virginia. At the time, Bell told reporters, "Here's people that aren't getting a paycheck because of somebody else's dispute. But the fact of the matter is, with Virginia law, that if we stay in the market, we could be exposing ourselves to

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Means for the State's Beer Landscape, GOOD BEER HUNTING (Mar. 4, 2020), https://www.goodbeerhunting.com/sightlines/3/4/what-reyes-massive-california-footprint-means-for-the-states-beer-landscape (on file with the *University of the Pacific Law Review*) (reporting that one California brewer observed, "Reyes could theoretically buy the entire contiguous U.S. of blue houses.").

47. Josh Noel, *Dispute Taps Bell's out of the Illinois Market*, CHI. TRIB. (Nov. 10, 2006); *Who We Are*, CHI. BEVERAGE, https://www.chicagobeveragesystems.org/who-we-are (last visited Mar. 14, 2021) (on file with the *University of the Pacific Law Review*).

48. Noel, *supra* note 47.

49. *Id.*

50. Mike Hughlett, *Bell's Brings Beer Back to Area*, CHI. TRIB., Aug. 1, 2008.

51. *Id.*

A few years before Bell's saga in Illinois, another craft brewer from a nearby state entered and then left the market, though for different stated reasons. Wisconsin-based New Glarus, maker of Spotted Cow farmhouse ale, pulled out of the Illinois market in 2003 citing problems with producing enough beer for distribution in its home state and in Illinois. At the time, its Wisconsin distributors spoke approvingly of the decision. Robert Gutsche Jr., *Brewer's Success to Leave Illinois Flat*, CHI. TRIB. (Dec. 4, 2002). Nearly twenty-years later, New Glarus still does not distribute outside of Wisconsin. In a recent interview, Dan Carey, who co-founded New Glarus with his wife Deb Carey, suggested that New Glarus has made the decision not to distribute outside of its home state in order maintain control over its products and its relationships. Ken, *Better on Draft 235 – New Glarus Brewing w/ Dan Carey*, BETTER ON DRAFT (Sept. 19, 2020), https://www.betterondraft.com/shows/better-on-draft-235-new-glarus-brewing (on file with the *University of the Pacific Law Review*) (discussing around minute 23:00, "Business is a lot like war, in the sense that you're only as strong as your supply chain. We're better off having a strong relationship with our wholesalers, our retailers, and our customers in Wisconsin"). In 2019, New Glarus produced 240,000 barrels, which is large for a craft brewery. *Id.*

legal risk that could be financially devastating."[52] Some of Bell's Brewery's other distributors in the state expressed disappointment in Bell's Brewery pulling out. One distributor said, "I just hate being collateral damage when it's such a great relationship."[53]

Recall that Virginia's beer franchise statute does require that a brewer give "reasonable consent" to the transfer of rights to a new distributor. In conjunction with the sale of its rights by Loveland, Bell's Brewery claimed that Loveland gave it insufficient information regarding Loveland's impending sale to Reyes. Bell's Brewery and Loveland went before the Virginia ABC in March 2019. And in May 2019, the Virginia ABC ordered the parties to arbitration. At the time, Larry Bell expressed pleasure with the decision, saying, "It puts us on a more even playing field as far as the venue is concerned. It gives us more standing than we would have had with the ABC."[54] The Virginia ABC subsequently vacated its arbitration order on appeal, saying that as an administrative body it did not have the authority to compel arbitration. Bell's Brewery then appealed that decision to the Court of Appeals of Virginia, only to withdraw the appeal in November 2020 after settling with Loveland and Reyes, who agreed to allow Bell's Brewery's rights to be purchased by Specialty Beverage of Virginia.[55] Bell has said that his new contract states Bell's Brewery "will not accept Reyes as a successor wholesaler." Bell's Brewery added, "We sent out, about one and half years ago, a non-binding letter to all our wholesalers, stating that we will not accept, as a successor wholesaler any wholly owned branch of Anheuser-Busch or Molson Coors or Reyes."[56] Bell also said that his distributor in Indianapolis, which had sold itself to Reyes, carved out Bell's Brewery's rights as part of that sale. Around the same time, Bell's Brewery announced it was partnering with fifteen new distributors in Indiana, all affiliated with the AB distribution network.[57] He is trying, it seems, to signal to his distributors that he will fight attempts to sell his rights to Reyes, even if it is unlikely these right-of-first-refusal like provisions are unlikely to be enforced.

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52. Justin Kendall, *Bell's Brewery to Cease Beer Shipments to Virginia*, BREWBOUND (Feb. 5, 2019, 4:05 PM), https://www.brewbound.com/news/bells-brewery-to-cease-beer-shipments-to-virginia/ (on file with the *University of the Pacific Law Review*).

53. *Id.*

54. Mike Plantania, *ABC Orders Beer Summit in Bell's Brewery Distribution Dispute*, RICHMOND BIZSENSE (May 23, 2019), https://richmondbizsense.com/2019/05/23/abc-orders-beer-summit-bells-brewery-distribution-dispute/#djPop (on file with the *University of the Pacific Law Review*).

55. *See Appellate Case Management System*, CT. APPEALS VA., https://eapps.courts.state.va.us/cav-public (entering the CAV #033920 into the query to get the case information) (last visited Mar. 13, 2021). The terms of the settlement – and what, if anything, Bell's had to pay as part of it – were not disclosed publicly. *Bell's Is Headed Back to Virginia!*, BELL'S BEER, http://www.bellsbeer.com/news/bells-headed-back-virginia (last visited Mar. 14, 2021) (on file with the *University of the Pacific Law Review*).

56. Plantania, *supra* note 54.

Brewers cannot, of course, wholly own distributors in states with a three-tier system.

57. *Bell's Brewery Partners with New Distributors in Southern Indiana*, WEST MICH. TOURIST ASS'N (Dec. 9, 2020), https://www.wmta.org/2020/12/09/bells-brewery-partners-with-new-distributors-in-southern-indiana/ (on file with the *University of the Pacific Law Review*).

Understandably, Loveland/Reyes was not the only distributor upset by Bell's Brewery's decision to cease selling its beer in Virginia. One of Bell's Brewery's other distributors, Blue Ridge Beverage Company, attempted to bring proceedings against Bell's before the Virginia ABC.[58] Bell's responded by petitioning a federal court to compel arbitration, citing an arbitration provision in their distributor agreement.[59] While Bell's Brewery's agreement called for binding arbitration by the American Arbitration Association, Blue Ridge's president tried to argue that a phrase he had added under his signature (i.e., "I waive no rights under Virginia law.") meant that the dispute had to be heard by the Virginia ABC.[60] The federal judge hearing the case thought otherwise, reasoning that while the Virginia ABC might not be able to order arbitration, parties could certainly agree to it by contract.[61] Bell's Brewery subsequently settled with Blue Ridge, who continues to distribute Bell's Brewery in Virginia.[62]

It is notable that Bell's Brewery appears to include an arbitration clause within its distribution agreements. One of the things that arbitration may provide brewers like Larry Bell is a sense of control over their fate and the chance that if a sufficiently knowledgeable arbitrator is hired, he or she will provide a swift monetary buy-out figure that will allow Bell's Brewery to walk away from an agreement it does not like. Virginia, in fact, calls for a tripartite arbitration panel in cases where brewers and wholesalers are unable to agree on reasonable compensation for the value of their agreement but only after the Virginia ABC has found a brewer in violation by terminating the agreement without good cause.[63] Requiring private arbitration expedites the process considerably and allows the brewer to maintain slightly more say in the process that will decide its fate.[64] It also places the dispute before chosen arbitrators that may erase the "home-state advantage" that an in-state distributor might have over an out-of-state brewer.

This contractual move by Bell's Brewery seems to be effective—requiring that disputes be arbitrated rather than litigated—but a clause barring transfer to a successor distributor affiliated with Big Beer or Reyes seems harder to enforce. Perhaps, however, Bell's Brewery is hoping that such language, coupled with its now firmly established reputation for fighting such moves, will encourage future distributors (and anyone who might which to purchase them) that it is not worth

58. Bell's Brewery v. Blue Ridge Beverage Co., No. 1:20-cv-246, 2020 WL 4558734, at *1 (W.D. Mich. Aug. 7, 2020).

59. *Id.*

60. *Id.* at *2.

61. *Id.* at *2–3. It appears the decision was then appealed by Blue Ridge and scheduled for mediation but settled prior to mediation taking place.

62. *Bell's Is Headed Back to Virginia!*, *supra* note 55.

63. VA. CODE ANN. §4.1-508 (2021).

64. *See, e.g.*, ALA. CODE § 28-9-8 (2021); COL. REV. STAT. § 44-3-408 (2021) (damages); CONN. GEN. STAT. § 30-17 (2021) (termination for just cause hearing by Liquor Board); GA. CODE ANN. §§ 560-2-5 to -10 (2021) (termination determination by Department of Revenue); MASS. GEN. LAWS ch. 138, § 25E12 (2021); MD. CODE ANN., CTS. & JUD. PROC. § 5-109 (West 2021) (arbitration); OKLA. STAT. tit. 37A § 3-111 (2021).

the fight.

V. Relationship Management: What Brewers, Distributors, and Legislators Can Do to Improve Distribution Agreements

Fundamentally, the issue between brewers and distributors is one of trust. In the book *Beyond Reason, Using Emotions as You Negotiate*, Roger Fisher and Daniel Shapiro posit five core concerns that cause parties to react negatively if impinged upon.[65] One of those core concerns is autonomy.[66] Beer franchise statutes have robbed brewers of their autonomy when it comes to selling their products. If brewers want to grow, they have to acquiesce to being locked into a distributor relationship that is nearly impossible to extricate themselves from. This could be alleviated by allowing the vast majority of small breweries to choose to self-distribute, by clarifying what prices breweries will have to pay if they want to divorce their distributors, and perhaps by allowing brewers to withdraw from doing business in a state. By giving brewers autonomy to end their distributor relationship, states can foster trust while still providing some protections against bullying behavior by brewers.

Brewers are not, in general, against using distributors. As discussed earlier, the difficulties of maintaining a distribution network are significant, and outsourcing this work to a wholesaler is a sound business decision for many smaller brewers. Yet many breweries are wary when it comes to signing up for a distributor for fear that making the wrong choice of partner might hamper rather than help the expansion of their business. This issue of trust is heightened when franchise statutes allow distributors to transfer a brewer's business to a different distributor without the brewer's permission. Unfortunately, while craft brewers can choose to sign agreements with smaller, craft-focused distributors who are neither red- nor blue-house aligned, craft brewers cannot prevent those distributors from falling prey to industry consolidation.

And yet it does seem like many of the distributors' fears about anti-competitive and controlling behavior on the part of brewers, particularly large-scale brewers, is well founded. Companies that have negotiating leverage continue to put brewer-friendly terms in their distributor agreements—even when those provisions run contrary to state beer franchise statutes—and seek to use provisions like redirect clauses and rights of first refusal to ensure that their beer is being carried by distributors of their choice. While such provisions might be natural in many types of business arrangements, cases like *Rex Distributing* in Mississippi illustrate how brewers can use these provisions in a highly anti-competitive fashion, throwing their weight around to ensure that their distributors act in ways that hurt the business of smaller rival brewers.

States could simply undo the protectionist laws that seem to benefit the

65. ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE (2006).

66. The other core concerns are Appreciation, Affiliation, Role, and Status. *Id.*

distributor tier at the expense of the brewer tier, but that seems to create the ground for even more capture of distributors by large-scale brewers.[67] And recent history suggests that these brewers would be only too happy to do so in the absence of statutes preventing it. Wholesale removal of these franchise statutes does not address the concerns of smaller, independent craft breweries who are unlikely to have the resources at Larry Bell's disposal to fight.

There are steps that breweries can take to mitigate some of the concerns of being statutorily locked into a relationship with their distributors. They can be careful to enter into distribution agreements only with businesses they know and trust—though this can be hard to do when trying to enter into a new territory, and when a distributor wants to close up shop, it still has the power to transfer its rights to new distributors.[68] At least in states where "good cause" for termination includes failure to perform terms material to the agreement, brewers may also be able to put in reasonable performance metrics into their distributor agreements that could provide good cause for termination.[69]

The simple change that would affect the greatest number of breweries would be to raise the self-distribution cap for brewers. Most states do allow self-distribution of a brewer's beer below a certain barrel production threshold. In some states this number is quite low. Michigan, for instance, recently raised its self-distribution cap from 1,000 barrels to 2,000 barrels.[70] In the United States, a barrel of beer contains thirty-one gallons, and a keg in a bar is about half a barrel or 124 pints of beer.[71] Kentucky brewers are currently pushing to have their self-distribution cap raised to 2,500 barrels.[72] Even a relatively modest increase in the self-distribution thresholds could help growing breweries. In 2019, only eighty breweries produced more than 100,000 barrels of beer, and only twenty-six breweries produced more than 1,000,000 barrels.[73] The other 6,000-plus breweries all produced less, with the vast majority of those breweries (over

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67. *See, e.g.*, Croxall, *supra* note 6, at 403.

68. Industry specialists suggest reviewing "a proposed distributor's long-term goals and objectives, as well as speaking with retailers about their experiences with the distributor and other suppliers of similar size in the market." Also, hire a good lawyer. Malkin & Hanke, *supra* note 11.

Groups like the Brewers Association (a trade group for craft brewers) provide details lists of questions that brewers should consider when choosing distributors. *Selecting a Distributor*, BREWERS ASS'N (Feb. 28, 2019), https://www.brewersassociation.org/brewing-industry-updates/selecting-a-distributor/ (on file with the *University of the Pacific Law Review*).

69. *Selecting a Distributor*, *supra* note 68.

70. 2020 Mich. Pub. Acts 107.

71. *Industry Fast Facts*, NAT'L BEER WHOLESALERS ASS'N, https://www.nbwa.org/resources/industry-fast-facts (last visited Mar. 14, 2021) (on file with the *University of the Pacific Law Review*).

72. Eileen Street, *Kentucky Brewers Want Legislation to Sell Beer Directly to Restaurants, Bars*, SPECTRUM NEWS (Feb. 3, 2021, 9:05 PM), https://spectrumnews1.com/ky/louisville/news/2021/02/02/kentucky-guild-of-brewers-wants-legislation-to-sell-beer-directly-to-restaurants—bars (on file with the *University of the Pacific Law Review*).

73. *Number of Brewers by Production Size – CY 2019*, ALCOHOL & TOBACCO TAX & TRADE BUREAU (Mar. 11, 2020), https://www.ttb.gov/images/pdfs/statistics/production_size/2019_brew_prod_size_ttb_gov.pdf (on file with the *University of the Pacific Law Review*).

4,500) producing fewer than 1,000 barrels.[74] Even the modest increases discussed above make a big difference. Raising the self-distribution cap to 100,000 barrels would mean nearly every brewery in the country would have the choice whether to enter into a distribution agreement, while still providing protection from the type of Big Beer bad behavior contemplated when beer franchise statutes were enacted.

Another change that would provide clarity in brewer distributor disputes is to create statutory buy-out provisions for brewers who wish to terminate their distribution agreements. For example, in early 2021, Massachusetts passed a law allowing brewers that make under 250,000 barrels of beer annually to terminate their distribution agreements without cause upon thirty days' notice to a distributor and payment of the fair market value of the distribution rights.[75] Either party may request that the value be determined by binding, tripartite arbitration.[76] Many smaller breweries are unlikely to have the funds to buy themselves out of their distribution agreements, while larger breweries might consider it just another cost of doing business.[77] Still, statutes like this at least give brewers the power to choose to withdraw from a distribution agreement if they have the means to pay for it.

Finally, states could begin formally allowing brewers to withdraw from distribution in a state for a set period to terminate their contracts. This would cause the kinds of collateral damage seen in Bell's Brewery's dispute in Virginia—requiring brewers to terminate agreements with all their distributors in a state. But it would provide a formal mechanism for brewers to control their relationship with distributors and retain control over their products.

Steps like these that legislators can take to give brewers more control over their distributor relationships will allow brewers to enter into their distribution agreements whole-heartedly, or at least with less trepidation.

The concerns about over-controlling breweries that motivated the initial adoption of beer franchise statutes have not gone away, but many new brewers have entered the market. Also, distributors have grown considerably more powerful over the past fifty years. The laws need to change to give brewers more choice and control in their distributor relationships to ward off end-of-relationship conflicts. While processes like arbitration may serve to shift the conflict into the private sphere and quicken the time to resolution, arbitrators must apply the law, and the vagueness of good cause termination leaves room for

74. *Id.*

75. 2020 Mass. Acts 324. The statute defines "fair market value" as "the price that the affected wholesaler's business that is related to the terminated brands of the brewery would sell for in an arms-length transaction between a willing buyer and a willing seller as of the date the notice of termination was received by the affected wholesaler under paragraph (1) of subsection (c) with neither being required to act and both having reasonable knowledge of all relevant facts."

76. *Id.* at f(1). In tripartite arbitration, each party picks an arbitrator and those two arbitrators select a third arbitrator to serve on their three-member panel.

77. *See, e.g.*, Croxall, *supra* note 6, at 420.

error by arbitrators. Arbitration alone will not solve this conflict. Legislators must join with brewers and distributors in healing this relationship.

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