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Why can't I get Pliny the Elder?

BEER DISTRIBUTION LAW IN MICHIGAN

BY KINCAID C. BROWN

If you are a craft beer drinker, you have noticed that there are many beers brewed in the United States that you cannot buy in Michigan, like California-based Pliny the Elder.¹ You will have also noticed that there are many craft beers brewed in Michigan that you cannot buy at your local grocery store or bottle shop.

Why is that the case? The short answer is because Michigan law mandates that beer pass through what's known as a three-tier distribution system.² This article outlines what a three-tier distribution is, what it means for Michigan brewers and beer drinkers, and how Michigan law treats beer and wine differently.

THE THREE-TIER DISTRIBUTION SYSTEM

The three-tier distribution system divides commercial actors in the beer ecosystem into three groups: manufacturers (i.e., brewers) or suppliers, wholesalers or distributors, and retailers.³ Three-tier distribution became the primary system for alcohol regulation in states after the repeal of the 21st Amendment.⁴ The three-tier distribution system was seen as a way to combat both societal and economic problems related to alcohol sales in the Prohibition era by separating the three tiers of actors and their related financial interests. The societal issues the three-tier distribution system was established to address were those that motivated Prohibition: for example, saloons that were affiliated with a specific alcohol manufacturer and exclusively sold those products were largely left to fester in absentee ownership and became places where vice and violence were not controlled.⁵

In Michigan, the three-tier system was employed because of concerns with vertical integration in the alcoholic beverage industry and concerns that large suppliers (i.e., brewery conglomerates such as Anheuser-Busch InBev) would engage in anti-competitive behavior.⁶ Like other states, Michigan has prohibited financial interests in multiple tiers of the three-tier system.⁷ The economic impact of the three-tier system is protection of smaller manufacturers so that larger manufacturers and suppliers cannot provide incentives to retailers to prioritize their products over competitors both large and

small. On the flip side, the licensing requirements of the three-tier system increase transaction costs for smaller and out-of-state brewers, reducing the ability or interest in entering the Michigan market. These brewers must make agreements with individual distributors to have their products covered — which can translate into lost time and revenue for a small or new Michigan brewer trying to get its craft beer to customers or serve as an extra hoop for out-of-state brewers to jump through that may not make financial sense.

THE THREE-TIER SYSTEM IN MICHIGAN

In Michigan, the three-tier distribution system is legislatively applied to alcohol sales, including beer⁸ produced by Michigan brewers or microbrewers. A brewer is defined as a person licensed to manufacture beer and to sell it to wholesalers⁹ and, in some limited cases, sell its beer at retail.¹⁰ A microbrewer is defined as a brewer that manufactures fewer than 60,000 barrels of beer in a year; for the 60,000-barrel threshold, all brands and labels, whether brewed in Michigan or out of state, are added together.¹¹ Brewpubs, defined as a place where beer is manufactured on the premises and sold for consumption,¹² and tasting rooms, defined as a location where a brewer may sell beer at retail,¹³ operate outside of the three-tier system. Other than those exceptions noted above, all beer sales in Michigan must be through licensed wholesalers.¹⁴ Brewers and microbrewers must grant each wholesaler exclusive sales territories with no permissible overlap.¹⁵

Michigan has tried to create access to the beer market “while also preserving the 3-tier system and limiting vertical integration” by making an exception for microbrewers that sell no more than 2,000 barrels of beer a year.¹⁶ These microbrewers may sell their beer directly to retailers (i.e., skipping the wholesaler middle tier) under certain conditions. These conditions include that the microbrewer has not made an agreement with a wholesaler for the territory in which the retailers are located,¹⁷ the beer is sold and delivered to the retailer by the microbrewer's employees,¹⁸ as well as some labor and transportation requirements.¹⁹ In calculating the 2,000-barrel threshold, all labels and brands are combined,

although sales on licensed premises like tasting rooms are not included.²⁰ Out-of-state entities that meet the conditions of this section also can take advantage of this exception.²¹

THE DIFFERENCE BETWEEN BEER AND WINE IN MICHIGAN

While winemakers generally need to utilize the same three-tier distribution system²² as beer manufacturers and take advantage of retail exceptions such as tasting rooms,²³ there are a couple of ways that allow for freer commerce for winemakers in Michigan. First, winemakers may self-distribute to retailers.²⁴ Winemaker employees in these cases are required to hold a salesperson license.²⁵ Second, winemakers may get a direct shipper license²⁶ permitting them to ship wine directly to a consumer's home.²⁷ The ability to ship wine directly to consumers was a big advantage during the pandemic with the steep rise in internet commerce as many consumers spent more time at home and reduced all forms of travel.

Michigan's disparity in the treatment of wine and beer is not uncommon:²⁸ only 11 states plus the District of Columbia permit direct shipping of beer in at least some instances,²⁹ while 47 states plus the District of Columbia permit direct shipping of wine.³⁰ It's important to note that currently, the United States Postal Service does not permit the shipping of alcohol, although there have been recent attempts to amend that law.³¹ Breweries and wineries shipping alcohol directly to consumers must use a private company such as FedEx or UPS.



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ENDNOTES

1. *Pliny the Elder*, Beer Advocate <<https://www.beeradvocate.com/beer/profile/863/7971/>> [<https://perma.cc/SMC8-VXJ8>]. Pliny the Elder is a beer brewed in Santa Rosa, California, by Russian River Brewing Company and is annually rated among the best imperial IPAs brewed in the United States. All websites in this article were accessed Sept. 11, 2022.
2. MCL 436.1203(2)(b).
3. *Brewer or Micro Brewer Licensing Requirements & General Information*, Liquor Control Comm, Mich Dep't of Licensing and Regulatory Affairs <https://www.michigan.gov/documents/cis/Brewer_Micro_Brewer_211769_7.pdf> [<https://perma.cc/N758-Y39X>].
4. D'Aversa, *Brewing Better Law: Two Proposals to Encourage Innovation in America's Craft Beer Industry*, 165 U PA L Rev 1465, 1476 (2017), available at <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9587&context=penn_law_review> [<https://perma.cc/6N45-RQWE>].
5. Zolton, *Direct Shipping for Michigan Beer? Wine Not*, 2020 Mich St L Rev 509, 518 (2020), available at <<https://core.ac.uk/download/pdf/327102174.pdf>>.
6. MCL 436.1203a.
7. MCL 436.1603.
8. MCL 436.1203 and MCL 436.1203a.
9. MCL 436.1105(14).
10. MCL 436.1537.
11. MCL 436.1109(5).
12. MCL 436.1537(1)(j).
13. MCL 436.1113a(1)(a) and MCL 436.1536.
14. *Brewer or Micro Brewer Licensing Requirements*.
15. *Id.*
16. MCL 436.1203a(5).
17. MCL 436.1203a(5)(a).
18. MCL 436.1203a(5)(b).
19. MCL 436.1203a(5)(c).
20. MCL 436.1203a(5)(d).
21. MCL 436.1203a(5).
22. MCL 436.1203 and MCL 436.1203a.
23. MCL 436.1113a(1)(b) and MCL 436.1536.
24. *Wine Maker or Small Wine Maker Licensing Requirements & General Information*, Liquor Control Comm, Mich Dep't of Licensing and Regulatory Affairs <<https://www.michigan.gov/lara/-/media/Project/Websites/lara/lcc/MLCC-FAQs/MW-FAQ/Winemaker-Small-Winemaker-FAQ.pdf>> [<https://perma.cc/QK3N-8ZFS>].
25. *Id.*
26. *Id.*
27. MCL 436.1203(10).
28. 2022 *Direct-to-Consumer Beer Shipping Report*, SOVOS ShipCompliant (March 2022), available at <<https://www.sovos.com/shipcompliant/content-library/dtc-beer-report/>> [<https://perma.cc/VY2E-9MHE>].
29. *Direct Shipping for Michigan Beer? Wine Not*. These states are Alaska, Kentucky, Nebraska, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia.
30. MCL 436.1203(2)(b).
31. See e.g., *United States Postal Service Shipping Equity Act*, HR 3287, 117th Cong (2021).

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