

1 SB128  
2 163946-1  
3 By Senator Sanford  
4 RFD: Tourism & Marketing  
5 First Read: 03-MAR-15

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8 SYNOPSIS: Under existing law, large and small  
9 breweries are restricted in their ability to  
10 terminate their relationship with a beer  
11 wholesaler.

12 This bill would allow small breweries to  
13 enter into enforceable contracts with beer  
14 wholesalers which provide for the termination or  
15 changing of their relationship with beer  
16 wholesalers.

17  
18 A BILL  
19 TO BE ENTITLED  
20 AN ACT  
21

22 To amend Sections 28-9-2 and 28-9-6 of the Code of  
23 Alabama 1975, relating to beer suppliers and wholesalers; to  
24 allow small breweries to enter into enforceable contracts with  
25 beer wholesalers which provide for the termination or changing  
26 their relationship with beer wholesalers; and to add a new  
27 Section 28-9-6.1 to the Code of Alabama 1975, to provide the

1 procedure for the termination or changing of a small breweries  
2 relationship with a beer wholesaler.

3 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

4 Section 1. Sections 28-9-2 and 28-9-6 of the Code of  
5 Alabama 1975, are amended to read as follows:

6 "§28-9-2.

7 "(a) The following words or phrases, or the plural  
8 thereof, whenever they appear in this chapter, unless the  
9 context clearly requires otherwise, shall have the meanings  
10 ascribed to them in this section:

11 "(1) AGREEMENT. Any agreement between a wholesaler  
12 and a supplier, whether oral or written, whereby a wholesaler  
13 is granted the right to purchase and sell a brand or brands of  
14 beer sold by a supplier.

15 "(2) ANCILLARY BUSINESS. A business owned by a  
16 wholesaler, by a substantial stockholder of a wholesaler, or  
17 by a substantial partner of a wholesaler the primary business  
18 of which is directly related to the transporting, storing, or  
19 marketing of the brand or brands of beer of a supplier with  
20 whom the wholesaler has an agreement; or a business owned by a  
21 wholesaler, a substantial stockholder of a wholesaler or a  
22 substantial partner of a wholesaler which recycles empty  
23 beverage containers.

24 "(3) DESIGNATED MEMBER. The spouse, child,  
25 grandchild, parent, brother or sister of a deceased individual  
26 who owned an interest, including a controlling interest, in a  
27 wholesaler; or any person who inherits the deceased

1 individual's ownership interest in the wholesaler under the  
2 terms of the deceased individual's will, or under the laws of  
3 intestate succession of this state; or any person who or  
4 entity which has otherwise, by designation in writing by the  
5 deceased individual, succeeded the deceased individual in the  
6 wholesaler's business, or has succeeded to the deceased  
7 individual's ownership interest in the wholesaler pursuant to  
8 a written contract or instrument; and also includes the  
9 appointed and qualified personal representative and the  
10 testamentary trustee of a deceased individual owning an  
11 ownership interest in a wholesaler. Designated member also  
12 includes the person appointed by a court as the guardian or  
13 conservator of the property of an incapacitated individual  
14 owning an ownership interest in a wholesaler.

15 "(4) GOOD FAITH. Honesty in fact and the observance  
16 of reasonable commercial standards of fair dealing in the  
17 trade, as defined in and interpreted under the Uniform  
18 Commercial Code, Section 7-2-103.

19 "(5) REASONABLE QUALIFICATIONS. The standard of the  
20 reasonable criteria established and consistently used by the  
21 respective supplier for Alabama wholesalers that entered into,  
22 continued or renewed an agreement with the supplier during a  
23 period of 24 months prior to the proposed transfer of the  
24 wholesaler's business, or for Alabama wholesalers who have  
25 changed managers or designated managers during a period of 24  
26 months prior to the proposed change in manager or successor  
27 manager of the wholesaler's business.

1           "(6) RETALIATORY ACTION. Includes, but is not  
2 limited to, the refusal to continue an agreement, or a  
3 material reduction in the quality of service or quantity of  
4 products available to a wholesaler under an agreement, which  
5 refusal or reduction is not made in good faith.

6           "(7) SALES TERRITORY. An area of exclusive sales  
7 responsibility for the brand or brands of beer sold by a  
8 supplier as designated by an agreement.

9           "(8) SMALL SUPPLIER. A supplier in a "small supplier  
10 relationship" with a wholesaler. A "small supplier  
11 relationship" shall mean any relationship between a supplier  
12 and a wholesaler if sales of the supplier's products to the  
13 wholesaler do not exceed 20 percent of the total sales in the  
14 prior calendar year preceding any act or omission that might  
15 otherwise be governed by the provisions of this chapter. In  
16 calculating sales of a supplier to a wholesaler or the total  
17 sales of the wholesaler, the sales by a supplier or wholesaler  
18 in a "controlled group," as that term is defined in 26 U.S.C.  
19 § 5051(a)(2)(b), or a successor provision, shall count as the  
20 sales of a single entity.

21           "~~(8)~~(9) SUBSTANTIAL STOCKHOLDER or SUBSTANTIAL  
22 PARTNER. A stockholder of or partner in the wholesaler who  
23 owns an interest of 25 percent or more of the partnership or  
24 of the capital stock of a corporate wholesaler.

25           "~~(9)~~(10) SUPPLIER. A manufacturer or importer of  
26 beer licensed by the board, including any small supplier  
27 except for purposes of Section 28-9-6.

1           "~~(10)~~(11) TRANSFER OF WHOLESALER'S BUSINESS. The  
2 voluntary sale, assignment or other transfer of all or control  
3 of the business or all or substantially all of the assets of  
4 the wholesaler, or all or control of the capital stock of the  
5 wholesaler, including without limitation the sale or other  
6 transfer of capital stock or assets by merger, consolidation  
7 or dissolution, or of the capital stock of the parent  
8 corporation, or of the capital stock or beneficial ownership  
9 of any other entity owning or controlling the wholesaler.

10           "~~(11)~~(12) WHOLESALER. A wholesaler of beer licensed  
11 by the board.

12           "(b) Other words and phrases used in this chapter  
13 shall have the meanings ascribed to them in Section 28-3-1, as  
14 amended, and any acts amendatory thereof, supplementary  
15 thereto or substituted therefor, unless the context clearly  
16 requires otherwise.

17           "§28-9-6.

18           "(a) Notwithstanding any agreement and except as  
19 otherwise provided for in this chapter, a supplier shall not:  
20 amend or modify an agreement; cause a wholesaler to resign  
21 from an agreement; or cancel, terminate, fail to renew, or  
22 refuse to continue under an agreement, unless the supplier has  
23 complied with all of the following:

24           "(1) Has satisfied the applicable notice  
25 requirements of subsection (c) of this section.

26           "(2) Has acted in good faith.

1           "(3) Has good cause for the amendment, modification,  
2           cancellation, termination, nonrenewal, discontinuance, or  
3           forced resignation.

4           "(b) For each amendment, modification, termination,  
5           cancellation, nonrenewal, or discontinuance, the supplier  
6           shall have the burden of proving that it has acted in good  
7           faith, that the notice requirements under this section have  
8           been complied with, and that there was good cause for the  
9           amendment, modification, termination, cancellation,  
10          nonrenewal, or discontinuance.

11          "(c) Notwithstanding any agreement and except as  
12          otherwise provided in this section, and in addition to the  
13          time limits set forth in subdivision (d) (5) of this section,  
14          the supplier shall furnish written notice of the amendment,  
15          modification, termination, cancellation, nonrenewal, or  
16          discontinuance of an agreement to the wholesaler not less than  
17          60 days before the effective date of the amendment,  
18          modification, termination, cancellation, nonrenewal, or  
19          discontinuance. The notice shall be by certified mail and  
20          shall contain all of the following:

21                 "(1) A statement of intention to amend, modify,  
22                 terminate, cancel, not renew, or discontinue the agreement.

23                 "(2) A statement of the reason for the amendment,  
24                 modification, termination, cancellation, nonrenewal, or  
25                 discontinuance.

1           "(3) The date on which the amendment, modification,  
2           termination, cancellation, nonrenewal, or discontinuance takes  
3           effect.

4           "(d) Notwithstanding any agreement, good cause shall  
5           exist for the purposes of a termination, cancellation,  
6           nonrenewal, or discontinuance under subdivision (a) (3) of this  
7           section when all of the following occur:

8           "(1) There is a failure by the wholesaler to comply  
9           with a provision of the agreement which is both reasonable and  
10          of material significance to the business relationship between  
11          the wholesaler and the supplier.

12          "(2) The supplier first acquired knowledge of the  
13          failure described in subdivision (1) not more than 18 months  
14          before the date notification was given pursuant to subdivision  
15          (a) (1) of this section.

16          "(3) The wholesaler was given notice by the supplier  
17          of failure to comply with the agreement.

18          "(4) The wholesaler was afforded a reasonable  
19          opportunity to assert good faith efforts to comply with  
20          agreement within the time limits as provided for in  
21          subdivision (d) (5) of this section.

22          "(5) The wholesaler has been afforded 30 days in  
23          which to submit a plan of corrective action to comply with the  
24          agreement and an additional 120 days to cure such  
25          noncompliance in accordance with the plan.

26          "(e) Notwithstanding subsections (a) and (c) of this  
27          section, a supplier may terminate, cancel, fail to renew, or



1       discontinue an agreement immediately upon written notice given  
2       in the manner and containing the information required by  
3       subsection (c) of this section if any of the following occur:

4               "(1) Insolvency of the wholesaler, the filing of any  
5       petition by or against the wholesaler under any bankruptcy or  
6       receivership law, or the assignment for the benefit of  
7       creditors or dissolution or liquidation of the wholesaler  
8       which materially affects the wholesaler's ability to remain in  
9       business.

10              "(2) Revocation or suspension of the wholesaler's  
11       state or federal license by the appropriate regulatory agency  
12       whereby the wholesaler cannot service the wholesaler's sales  
13       territory for more than 61 days.

14              "(3) The wholesaler, or a partner or an individual  
15       who owns 10 percent or more of the partnership or stock of a  
16       corporate wholesaler, has been convicted of a felony under the  
17       United States Code or the laws of any state which reasonably  
18       may adversely affect the good will or interest of the  
19       wholesaler or supplier. However, an existing stockholder or  
20       stockholders, or partner or partners, or a designated member  
21       or members, shall have, subject to the provisions of this  
22       chapter, the right to purchase the partnership interest or the  
23       stock of the offending partner or stockholder prior to the  
24       conviction of the offending partner or stockholder and if the  
25       sale is completed prior to conviction the provisions of this  
26       subdivision (3) shall not apply.

1           "(f) Notwithstanding subsections (a), (c) and (e) of  
2 this section, upon not less than 15 days' prior written notice  
3 given in the manner and containing the information required by  
4 subsection (c) of this section, a supplier may terminate,  
5 cancel, fail to renew, or discontinue an agreement if any of  
6 the following events occur:

7           "(1) There was intentional fraudulent conduct  
8 relating to a material matter on the part of the wholesaler in  
9 dealings with the supplier. Provided, however, the supplier  
10 shall have the burden of proving intentional fraudulent  
11 conduct relating to a material matter on the part of the  
12 wholesaler.

13           "(2) The wholesaler failed to confine to the  
14 designated sales territory its sales of a brand or brands to  
15 retailers. Provided this subdivision does not apply if there  
16 is a dispute between two or more wholesalers as to the  
17 boundaries of the assigned territory, and the boundaries  
18 cannot be determined by a reading of the description contained  
19 in the agreements between the supplier and the wholesalers.

20           "(3) A wholesaler who has failed to pay for beer  
21 ordered and delivered in accordance with established terms  
22 with the supplier fails to make full payment within two  
23 business days after receipt of written notice of the  
24 delinquency and demand for immediate payment from the  
25 supplier.

26           "(4) A wholesaler intentionally has made a transfer  
27 of wholesaler's business, other than a transfer to a

1 designated member or pursuant to a loan agreement or debt  
2 instrument, without prior written notice to the supplier, and  
3 has failed, within 30 days from the receipt of written notice  
4 from the supplier of its intent to terminate on the ground of  
5 such transfer, to reverse said transfer of wholesaler's  
6 business.

7 "(5) A wholesaler intentionally has made a transfer  
8 of wholesaler's business, other than a transfer to a  
9 designated member, although the wholesaler has prior to said  
10 transfer received from supplier a timely notice of disapproval  
11 of said transfer in accordance with this chapter.

12 "(6) The wholesaler intentionally ceases, or ceases  
13 for a period of more than 61 days, to carry on business with  
14 respect to any of supplier's brand or brands previously  
15 serviced by wholesaler in its territory designated by the  
16 supplier, unless such cessation is due to force majeure or to  
17 labor dispute and the wholesaler has made good faith efforts  
18 to overcome such events. Provided, however, this shall affect  
19 only that brand or brands with respect to which the wholesaler  
20 ceased to carry on business.

21 "(g) Notwithstanding subsections (a), (c), (e), and  
22 (f) of this section, a supplier may terminate, cancel, not  
23 renew, or discontinue an agreement upon not less than 30 days'  
24 prior written notice if the supplier discontinues production  
25 or discontinues distribution in this state of all the brands  
26 sold by the supplier to the wholesaler. Provided, however,  
27 nothing in this section shall prohibit a supplier from: (1)

1 upon not less than 30 days' notice, discontinuing the  
2 distribution of any particular brand or package of beer; or  
3 (2) conducting test marketing of a new brand of beer or of a  
4 brand of beer which is not currently being sold in this state,  
5 provided that the supplier has notified the board in writing  
6 of its plans to test market, which notice shall describe the  
7 market area in which the test shall be conducted; the name or  
8 names of the wholesaler or wholesalers who will be selling the  
9 beer; the name or names of the brand of beer being tested; and  
10 the period of time, not to exceed 18 months, during which the  
11 testing will take place.

12 "(h) This section shall not apply to a small  
13 supplier."

14 Section 2. Section 28-9-6.1 is added to the Code of  
15 Alabama 1975, to read as follows:

16 §28-9-6.1.

17 (a) A relationship between a small supplier and a  
18 wholesaler for the distribution of beer may be discontinued as  
19 established by written contract or through the process  
20 described in this section. For purposes of this section,  
21 "discontinued" shall include termination, cancellation,  
22 nonrenewal, resignation, noncontinuance, or any other method  
23 that halts a small supplier relationship.

24 (b) Nothing in this chapter shall be construed to  
25 expand or diminish the rights or obligations established by  
26 contract in a small supplier relationship; provided, however,  
27 that a small supplier also may elect at any time to

1       discontinue its sales to any wholesaler in accordance with  
2       subsection (c).

3               (c) To initiate a small supplier's noncontractual  
4       right to discontinue sales to a wholesaler as established  
5       under this subsection, the small supplier shall provide the  
6       wholesaler with not less than 30 days' written notice of such  
7       discontinuance, which written notice shall identify the  
8       successor wholesalers who will begin servicing the affected  
9       territory. Upon any discontinuance under this subsection, the  
10      successor wholesalers shall compensate the affected wholesaler  
11      in an amount equal to the fair market value of the small  
12      supplier's distribution rights granted to the wholesaler in  
13      the territory previously served by the discontinued  
14      wholesaler. A small supplier's discontinuance may take effect  
15      following the notice period stated in the small supplier's  
16      notice, which shall not be less than 30 days, regardless of  
17      whether the successor wholesaler has compensated the affected  
18      wholesaler. If the successor wholesalers and the affected  
19      wholesaler cannot agree to the fair market value compensation  
20      due to the affected wholesaler within 30 days following the  
21      small supplier's notice of discontinuance, either the affected  
22      wholesaler or any successor wholesaler may request that the  
23      amount of compensation be determined by final binding  
24      arbitration conducted in accordance with subsections (b)  
25      through (h) of Section 28-9-8, except that the mutual  
26      agreement of both parties shall not be required in order for

1 one party to commence arbitration proceedings under this  
2 subsection.

3 Section 3. This act shall become effective  
4 immediately following its passage and approval by the  
5 Governor, or its otherwise becoming law.