

HB 1265

Testimony before the House Industry Business and Labor Committee
January 20, 2021

Mr. Chairman, members of the House Industry Business and Labor Committee,

My name is Janet Seaworth, I am Executive Secretary and Legal Counsel for the North Dakota Beer Distributors Association, a trade organization representing North Dakota's family owned and operated beer distributors. Last year, we celebrated our 75th anniversary. We now have distributors that are in their 4th generation of family ownership. We appear today in opposition to HB 1265. We believe this bill is unwarranted and proposed ill-advised exceptions to the three-tier system. We are concerned that key provisions of the bill may be challenged by out-of-state of brewers and retailers who may want the same privileges. It also creates an unfair playing field for the other 1,600 North Dakota retailers.

As this committee knows, the backbone of alcohol regulation, in all 50 states and on the federal level, is the three-tier system. The three-tier system of alcohol distribution is comprised of manufacturers (brewers), distributors, and retailers (taverns, bars, liquor stores). No tier controls another. Distributors separate manufacturers and retailers to ensure moderation and stability and prevent manufacturers from exerting pressure on retailers to sell their alcohol – thus ensuring the orderly and transparent distribution and sales of alcohol. With the exception of brew pubs and small brewers, each tier is limited to its service focus.

Brew pubs are specialty retailers. HB 1265 concerns brew pubs, which are retailers that have the special privilege of brewing their own beer. They hold a retail license and sell other alcohol direct to the public. They are not production brewers.

Allowing brew pubs to sell up to five gallon kegs turns these specialty retailers into production brewers. Currently, brew pubs may sell product manufactured on the premises for off-premise consumption in brewery sealed containers up to three gallons and the amount they may sell to any person is limited to a case of beer per day. That's already generous. MN and MT only allow the sale of growlers for off-premise consumption. HB 1265 seeks to allow brew pubs to sell unlimited amounts of additional packages, up to sixth barrel (5.16 gallon) kegs, for off premise consumption. That is contrary to the intent to allow a local tavern the special privilege of brewing its own beer for enjoyment inside the restaurant or bar. Allowing brew pubs to operate as production brewers, bottling and selling all packages while holding a retail license, creates a constitutional issue because large out-of-state breweries are prohibited from holding a retail license. Further, allowing brew pubs to sell direct to retail would allow them to operate in all three tiers. This exposes our laws to serious and expensive legal challenges by out-of-state breweries and retailers that are not afforded the same regulatory exceptions that ND brew pubs are afforded.

Out-of-state brewers and retailers may challenge the regulatory exceptions afforded brew pubs. The law is clear that states may not discriminate between in-state and out-of-state

brewers and retailers. In 2005, the U.S. Supreme court in Granholm v. Heald, 544 U.S. 460, examined Michigan and New York laws that allowed in-state alcohol producers to sell direct to the public but prohibited out-of-state producers from doing so. The court struck down those laws as unconstitutional and ruled that states may not discriminate between in-state and out-of-state alcohol producers. We are concerned that this bill would run afoul of the commerce clause for similar reasons – if a brew pub is allowed to morph into a brewer while holding a ND retail license, an out-of-state brewer may argue that they are being discriminated against under ND law because they are prohibited from holding the same retail license. In 2019, the Granholm rule was extended to the retail tier in Tennessee Wine and Spirits Retailers Assn. v. Thomas, 139 S. Ct. 2449 (2019). Since the Tennessee case, there have been over a dozen lawsuits filed testing laws that allow in-state retailers to do things that out-of-state retailers may not.

Expanded retail and new distribution privileges for brew pubs are not warranted. It does not appear that these expanded retail and distribution privileges are warranted. The Brewers Guild did not ask for this bill and the brew pub that instigated the bill does not even have the capacity to produce enough beer to fill distributor orders or engage in any significant self-distribution. Even among small brewers, for whom self-distribution is allowed, only a few do it. Under these circumstances, we struggle to understand why this bill is needed. If, as we have been led to understand, COVID is somehow a justification for the deregulation of alcohol in this manner, we would urge you to carefully consider whether the Covid-19 crisis should ever drive the government to permanently change regulatory measures intended to safeguard the public. Temporary de-regulation may have its place, but Covid-19 should not be used as an excuse to disrupt the alcohol regulatory system.

In closing, it does not seem reasonable to us to allow legislation that is unnecessary, that erodes the three-tier system, that provides a potentially unconstitutional in-state preference, and that unfairly discriminates against existing retailers. We urge you to vote no on HB 1265.

Thank you.

Janet Demarais Seaworth
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North Dakota Beer Distributors Association

For more information about the three-tier system of alcohol distribution, watch the NBWA/WBAE Three-Tier Education Video at <https://www.youtube.com/watch?v=tqaFin7FhUo>