



STATE OF KANSAS

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October 9, 1985

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ATTORNEY GENERAL OPINION NO. 85- 139

John A. Lamb, Director
Alcoholic Beverage Control Division
Kansas Department of Revenue
700 Jackson
Topeka, Kansas 66612

Re: Intoxicating Liquors and Beverages -- General
Provisions -- Kansas Liquor Control Act; Definitions

Synopsis: Pursuant to K.S.A. 1984 Supp. 41-102(b), as amended by L. 1985, ch. 168, §1, "alcoholic liquor" is defined to mean any beverage which contains alcohol, spirits, wine or beer, with the only exception being cereal malt beverages containing less than 3.2% alcohol by weight. As a result, a beverage which contains a measurable amount of alcohol and which is not a cereal malt beverage is considered to be an alcoholic liquor, regardless of whether the alcohol content is above or below 3.2% by weight. Such beverages may be sold only in licensed retail liquor stores, and may be made subject to administrative rules and regulations which require the presence of a label or sticker which clearly identifies the beverage as alcoholic liquor under Kansas law. Cited herein: K.S.A. 1984 Supp. 41-102, as amended by L. 1985, ch. 168; K.S.A. 41-308; 41-714; 41-805; 41-2701, as amended by L. 1985, ch. 171; K.A.R. 1984 Supp. 14-6-3; 14-6-5.

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Dear Mr. Lamb:

As Director of the Alcoholic Beverage Control Division of the Kansas Department of Revenue, you request our opinion concerning a product seeking approval for sale in Kansas called "Pommac." Specifically, you inquire whether the product, which contains 0.2% alcohol, is an "alcoholic liquor" as that term is defined in K.S.A. 1984 Supp. 41-102(b), as amended by L. 1985, ch. 168, §1. Further, you state that the Federal Bureau of Alcohol, Tobacco and Firearms routinely approves labels bearing the statement "non-alcoholic" for wine products containing a very low concentration of alcohol such as "Pommac." You ask whether federal law would preclude Kansas from requiring additional labeling stating that "Pommac" is classified as an alcoholic liquor under Kansas law, and so may be sold only in licensed retail liquor stores.

K.S.A. 1984 Supp. 41-102(b) as amended defines the term "alcoholic liquor" as follows:

"(b) 'Alcoholic liquor' means alcohol, spirits, wine, beer and every liquid or solid, patented or not, containing alcohol, spirits, wine or beer and capable of being consumed as a beverage by a human being but shall not include any beer or cereal malt beverage containing not more than 3.2% alcohol by weight."

Under the facts presented, "Pommac" would be considered an "alcoholic liquor" pursuant to K.S.A. 1984 Supp. 41-102(b), as amended, insofar as it contains wine and "spirits" (i.e. cognac), and is capable of being consumed as a beverage. The only exception made by the statute on the basis of alcohol content is for cereal malt beverages, which are defined to include "fermented but undistilled liquor brewed or made from malt." K.S.A. 41-2701, as amended by L. 1985, ch. 171, §5. By its very description, "Pommac" is not a cereal malt beverage.

This result was also reached in the case of State v. Sleeth, 7 Kan.App.2d 203 (1982), which involved a prosecution for sale of alcoholic liquor to a minor. In response to the defense that the drink served contained less than 3.2% alcohol by weight, and so was not alcoholic liquor, the court held:

"The term 'alcoholic liquor' is defined by K.S.A. 1980 Supp. 41-102(2). The definition excludes beer or cereal malt beverage containing not more than 3.2 percent alcohol by weight. Defendant suggests therefore than anything containing a lesser amount of alcohol does not fit the definition. We do not agree, for clearly every liquid containing alcohol of whatever measurable amount, capable of being consumed by the human being, exclusive of beer or cereal malt beverage containing not more than 3.2 percent alcohol by weight, is 'alcoholic liquor' as defined by and referred to in the Kansas Liquor Control Act." Ibid.

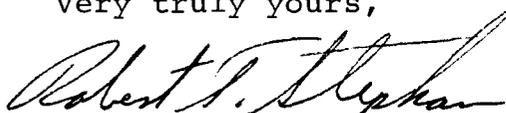
Your second inquiry concerns the labeling of "Pommac" under federal and state law. At the present time, federal regulations permit beverages such as "Pommac" to be labeled and marketed as "non-alcoholic." However, given the current Kansas statutes in effect, such labeling would be inaccurate. Accordingly, you inquire if the state may require bottles of "Pommas" to be affixed with an additional label which would indicate that the beverage is considered to be alcoholic liquor under Kansas law.

Our review of the federal law and regulations in this area does not indicate that such action would be precluded. Further, the director of ABC is specifically empowered to adopt administrative rules and regulations concerning the display of alcoholic liquor (K.S.A. 41-714) and in fact has done so. K.A.R. 1984 Supp. 14-6-3 requires each package of alcoholic liquor to bear a label showing the alcoholic content thereof, while K.A.R. 1984 Supp. 14-6-5 prohibits labels from containing false or misleading representations. The sale of "Pommac" without a label indicating the alcoholic content would give the impression that the product was non-alcoholic (as it in fact is under federal law), a statement which is not correct under the laws of this state. Therefore, it is within the authority of the director, as set out in existing statutes and regulations, to require "Pommac" to contain this additional information. Additionally, as an alcoholic liquor, "Pommac" may be sold in Kansas only by licensed retailers and only upon licensed premises. K.S.A. 41-308, 41-805.

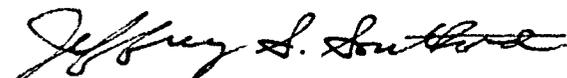
In conclusion, pursuant to K.S.A. 1984 Supp. 41-102(b), as amended by L. 1985, ch. 168, §1, "alcoholic liquor" is defined to mean any beverage which contains alcohol, spirits, wine or

beer, with the only exception being cereal malt beverages containing less than 3.2% alcohol by weight. As a result, a beverage which contains a measurable amount of alcohol and which is not a cereal malt beverage is considered to be an alcoholic liquor, regardless of whether the alcohol content is above or below 3.2% by weight. Such beverages may be sold only in licensed retail liquor stores, and may be made subject to administrative rules and regulations which require the presence of a label or sticker which clearly identifies the beverage as alcoholic liquor under Kansas law.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Deputy Attorney General

RTS:JSS:crw