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ATTORNEY GENERAL OPINION NO. 91- 72

Robert A. Engler, Director
Alcoholic Beverage Control Division
Kansas Department of Revenue
512 W. 6th, Second Floor
Topeka, Kansas 66603

Re: Intoxicating Liquors and Beverages--Licensing and
Related Provisions; City Option--Retailer's
License; Rights of Licensee; "Service or Thing of
Value" Defined

Synopsis: Under current statutes and administrative
regulations the only services licensed retailers
can provide are the sale of lottery tickets and
delivery to a club, drinking establishment, or
caterer. No other service whatsoever is allowed.
Retailers are also prohibited from selling or
giving away things of value. The terms "service"
and "things of value" are subject to reasonable
regulatory definition as outlined herein. Cited
herein: K.S.A. 1990 Supp. 41-210; 41-308; 41-702;
K.S.A. 77-201; K.A.R. 14-10-10; 14-13-13.

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Dear Mr. Engler:

As director of the alcoholic beverage control division of the
Kansas department of revenue, you request our opinion
concerning the meaning attributable to K.S.A. 1990 Supp.
41-308(b). The statute in question states as follows:

"(b) The holder of a retailer's license shall not sell, offer for sale, give away or permit to be sold, offered for sale or given away in or from the premises specified in such license any service or thing of value whatsoever except alcoholic liquor in the original package, except that a licensed retailer may:

"(1) Charge a delivery fee for delivery to a club, drinking establishment or caterer pursuant to subsection (a); and

"(2) sell lottery tickets and shares to the public in accordance with the Kansas lottery act, if the retailer is selected as a lottery retailer." (Emphasis added).

Specifically you question what constitutes a "service or thing of value" as that term is used in the liquor control act, in general, and K.S.A. 1990 Supp. 41-308(b), in particular.

Chapter 41 of the Kansas Statutes Annotated, commonly called the liquor control act, does not contain a definition for "service" or "thing of value." The phrase was a part of K.S.A. 41-308 as originally introduced in 1949. Although there have been several major revisions of this statute since its initial passage, the language "service or thing of value whatsoever" has remained unchanged. Because this provision is over forty years old, no committee minutes exist to explain the legislative intent behind the inclusion of these words.

Although a licensed retailer is prohibited from selling or giving away any service of thing of value whatsoever, K.S.A. 1990 Supp. 41-308(b) does carve out two exceptions. Licensed retailers may:

"(1) Charge a delivery fee for delivery to a club, drinking establishment or caterer pursuant to subsection (a); and

"(2) Sell lottery tickets and shares to the public in accordance with the Kansas lottery act, if the retailer is selected as a lottery retailer."

Neither the statute itself, nor the liquor control act shed any further light on what is meant by "service or thing of value."

K.S.A. 1990 Supp. 41-210 gives the director of alcoholic beverage control broad discretionary powers to govern the traffic in alcoholic liquors and to strictly enforce the provisions of the liquor control act. By statute, the director can recommend promulgation of rules and regulations necessary to carry out the intent and purposes of the act. See also, Chambers v. Herrick, 172 Kan. 510 (1952).

Former directors have adopted two regulations pertinent to the interpretation of the phrase "service or thing of value." Things of value are specifically identified in K.A.R. 14-13-13(g) as "gifts, prizes, premiums, rebates or similar inducements." Although these items are not mentioned further with regard to licensed retailers, K.A.R. 14-10-10(e) provides a list of consumer advertising specialties which distributors are permitted to supply to clubs, drinking establishments and caterers. Those items include:

"[A]sh trays, bottle or can openers,
cork screws, shopping bags, matches,
printed recipes, pamphlets, cards,
leaflets, blotters, post cards and
pencils. . . ."

A consistent interpretation of the regulations in toto necessitates concluding that those items listed in K.A.R. 14-10-10(e) are things of value. Although distributors are permitted to distribute such items to on-premises licensees, because of their inherent value retailers may not offer such items to consumers.

No regulation deals squarely with clarification of the term "service," although K.A.R. 14-10-10(e) does state that the process of distributing consumer advertising specialties to clubs, drinking establishments and caterers is a service.

In March 1966, the director of alcoholic beverage control issued a memorandum in which he stated that the sale of cold beer was a service and therefore prohibited by law. As a direct result, the Kansas Supreme Court dealt with the legal issues regarding defining service or thing of value in Willcott v. Murphy, 204 Kan. 640 (1970). At that time, the court found the regulatory interpretation of the term thing of value clear, definite and within the director's

authority. The regulation contemplates that something offered or furnished in addition to, and separate and apart from, liquor or beer in the original package should be barred. Willcott v. Murphy, 204 Kan. 640, 645 (1970). But the court held that the legislature did not intend for the act of refrigerating beer to be a service as specified in K.S.A. 41-308. The court did not, however, add additional interpretation to the statutory construction of service or thing of value.

It is clear that the director of alcoholic beverage control is free to recommend promulgation of regulations with regard to the meaning of the terms service or thing of value, or the entire phrase "service or thing of value." K.S.A. 1990 Supp. 41-210. His power, however, must stem from the intent and purposes of the act. He is not authorized to adopt and promulgate rules which circumvent the Kansas statutes. Tewe v. City of Topeka Police and Fire Civil Service Com'n, 237 Kan. 96 (1985); Halford v. City of Topeka, 234 Kan. 934 (1984); Willcott v. Murphy, 204 Kan. 640 (1970). The following discussion is intended to assist in determining the parameters of the director's authority to define these terms.

Since there is no statutory definition for the term service or thing of value, and it is subject to various interpretations, the rules of statutory construction apply. K.S.A. 77-201 provides, in part, as follows:

"In the construction of the statutes of this state the following rules shall be observed, unless the construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute:

. . . .

"Second. Words and phrases shall be construed according to the context and the approved usage of the language, but technical words and phrases, and other words and phrases that have acquired a peculiar and appropriate meaning in law, shall be construed according to their peculiar and appropriate meanings."

See also, J.A. Tobin Const. Co., Inc. v. Kemp, 239 Kan. 430, 436 (1986) (words and phrases in statutes are construed according to the context and approved usage of the language, with words in common usage given their natural and ordinary meaning); Flour Mills of America v. Burrus Mills, Inc., 174 Kan. 709, 716, 717 (1953) (if statute is one passed with reference to a particular trade, business, or transaction, and words are used which everybody knows and understands to have a particular meaning, then words are to be construed as having that particular meaning, though it may differ from common or ordinary meaning of the words).

Our overview of liquor statutes, regulations, and the industry leads us to conclude that "thing of value" is a technical term in the field of alcoholic beverage regulation. The meaning changes slightly depending on the level of industry and the exchange involved. K.S.A. 1990 Supp. 41-702 refers to anything of value in regard to retailers, clubs, drinking establishments and caterers receiving things of value from manufacturers, or distributors. K.S.A. 1990 Supp. 41-308(b), the statute in question, references things of value that flow from a licensed retailer to a customer or consumer. The director has attempted to specify the definition of thing of value by regulation. He may alter this definition by further regulations, but the term thing of value should continue to conform with industry-specific meaning.

The term service, however, is not a technical term in the field of alcoholic beverage regulation. Although K.S.A. 1990 Supp. 41-308(b) exempts delivery fees and lottery ticket sales, it does not offer a proactive definition of the word. The regulations promulgated by the alcoholic beverage control division also fail to specify the industry meaning of the term. Dictionary definitions of the legal use of the word offer little clarity. According to Black's Law Dictionary 1227 (5th ed. 1979), the meaning of the word varies with the context of its usage. The Webster's II 1066 (New Riverside University Dictionary 1984) lists many definitions of the word, two of which seem pertinent to this industry: "work done for others as an occupation or business" and "an act of assistance or benefit: favor."

The director of alcoholic beverage control clearly has the statutory authority to fine-tune the definitions of service or thing of value. Cups, ice, openers, corkscrews, recipe cards, gift wrap, and candy clearly fall within the current statutory and regulatory definitions. Service lacks concrete definition but logically prohibits acts done to assist or benefit the

consumer. Although the director is free to adopt industry definitions, his interpretations cannot contravene the obvious legislative intent to curtail those items given to a consumer and those services provided to a customer. The language of K.S.A. 1990 Supp. 41-308(b) is restrictive on its face. The legislature that first adopted the liquor control act in 1949 drafted the statute such that a licensed retailer may not sell, offer, or give away "any service or thing of value whatsoever except alcoholic liquor in the original package." Even though the statute has been amended repeatedly, that particular phrase has never been changed.

In conclusion, until rules and regulations are promulgated, or the statute is amended, licensed retailer's can only provide the service of selling lottery tickets and charging a fee for delivery to a club, drinking establishment, or caterer. No other service whatsoever is allowed. A retailer is also prohibited from selling or giving away things of value. The terms "service" and "things of value" are subject to reasonable regulatory definition as outlined herein.

Very truly yours,



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