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March 19, 1987

ATTORNEY GENERAL OPINION NO. 87- 48

The Honorable Ron Fox
Representative, Twenty-First District
State Capitol, Room 112-S
Topeka, Kansas 66612

Re: Intoxicating Liquors and Beverages -- General Provisions -- Single-Classification Beer

Synopsis: According to Kansas case law, the Kansas legislature has the power to define all beer containing less than 5% alcohol by weight as a cereal malt beverage (CMB). The legislature may allow the sale of this "5% CMB" by all entities currently allowed to sell CMB, as well as by retail liquor stores currently restricted to the sale of "strong" beer. Whether a county voted for or against the 1986 constitutional amendment allowing liquor-by-the-drink in certain establishments open to the public has no bearing on this conclusion. Cited herein: K.S.A. 41-101; 41-102; 41-103; 41-211; 41-2701 et seq.; L. 1937, ch. 214; L. 1949, ch. 242, §§ 1-125; Kan. Const., Art. 15, § 10.

* * *

Dear Representative Fox:

As Representative for the Twenty-First District, you request our opinion regarding legislative powers. Specifically, you ask whether the legislature has the power to (1) redefine all beer, containing less than 5% alcohol by weight, as cereal malt beverage (CMB), and (2) allow this "5% CMB" to be sold by all entities currently allowed to sell CMB, as well

as by those establishments which currently are restricted to the sale of "strong beer." You cite the December 8, 1986 KBI laboratory report regarding the differences between 3.2% CMB and "strong" beer, and state that the difference between the two is "almost insignificant." You also indicate that a constitutional question regarding the voters' "common understanding" of the definition of "alcoholic beverage" may be at issue.

"Laws prohibiting the sale and use of intoxicating liquors were cradled in Kansas." U.S. v. Robason, 38 F. Supp. 991, 997 (D. Kan. 1941). "Kansas has been one of the pioneers, first in the regulation, and second in the prohibition of the beverage liquor traffic. Indeed as early as 1855, her Territorial Legislature passed acts regulating such traffic." Robason, at 992. The history of Kansas' treatment of alcohol is important to an understanding of the application of case law to proposed single-classification legislation. An appropriate and interesting historical review is provided in: The Intoxicating Liquor Cases, 25 Kan. 751 (1881) (Justice Brewer); State, ex rel., v. Owston, 138 Kan. 173 (1933); State, ex rel., Schneider v. Kennedy, 225 Kan. 1, 13; "Wyatt Earp and the Winelist: Is a Restaurant an 'Open Saloon?'," Barkley Clark, 47 J.B.A.K. 63 (1978); and Prohibition in Kansas: A History, Robert Smith Bader, University of KS Press (1986).

K.S.A. 41-102 states in part:

> "As used in [the liquor control] act, unless the context clearly requires otherwise:
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> . . . .
>
> "(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.
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> "(c) 'Beer,' when its meaning is not enlarged, modified, or limited by other words, means a beverage, containing more

> than 3.2% alcohol by weight, obtained by alcoholic fermentation of an infusion or concoction of barley, or other grain, malt and hops in water and includes beer, ale, stout, lager beer, porter and similar beverages having such alcoholic content."

K.S.A. 41-2701(a) states:

> "As used in this act unless the context otherwise requires:
>
> "(a) 'Cereal malt beverage' means any fermented but undistilled liquor brewed or made from malt or from a mixture of malt or malt substitute, but does not include any such liquor which is more than 3.2% alcohol by weight."

The question whether 3.2% beer should be deemed by the courts as intoxicating has been addressed many times by the Kansas Supreme Court. See, e.g., City of Topeka v. Zufall, 40 Kan. 47 (1888); State v. Schaefer. 44 Kan. 90 (1890). The most current view taken by the courts emerged in The Intoxicating Liquor Cases, 25 Kan. 751 (1881), where the Court made the distinction between beverages "containing enough alcohol to produce intoxication . . . but . . . not [considered an] intoxicating liquor," and those beverages which are deemed to be intoxicating, 25 Kan. at 766. The Intoxicating Liquor Cases Court stated that "[t]he courts may not say as a matter of law that the presence of a certain per cent of alcohol brings the compound within the prohibition, or that any particular ingredient does or does not destroy the intoxicating influence of the alcohol, or prevent it from ever being an alcoholic beverage," 25 Kan. at 768. (Emphasis added.)

In State v. Owston, 138 Kan. 173 (1933), the defendants were enjoined from selling a beverage commonly known as 3.2% beer. The Kansas Supreme Court held, under the state law then in effect, that this malt beverage was presumed to be intoxicating, but that this presumption could be met by evidence that it was not intoxicating as a matter of fact. State v. Miller, 92 Kan. 994 (1914), was cited by Owston: "The defendant in that case was asking the court to overlook what everybody knew -- that is, that Jamaica ginger was commonly sold and used as an intoxicating liquor, [j]ust because in [The Intoxicating Liquor Cases, decided]

some thirty years previously, the court had predicted that tinctures such as Jamaica ginger would never be used as beverages. The [Miller] court refused to do this and simply held that plain whisky, brandy, gin, wine or beer or other spiritous, malt, vinous or fermented liquors of the kind specifically mentioned in the statute shall be construed and held to be intoxicating. At the time that opinion was written, the beer commonly sold was intoxicating and every grown person knew it. That opinion, however, could not be cited as an authority that a defendant charged with selling beer could not offer evidence to prove that what he sold was not intoxicating." 138 Kan. at 181, 182. (Emphasis added).

In dicta, the Owston court invited the legislature to define those beverages to be deemed as intoxicating. The court considered a statement made in City of Topeka v. Heberling, 134 Kan. 330 (1931), which reads: "Such a liquid, when containing three or more per cent of alcohol, would be considered as intoxicating." 134 Kan. at 330. The Owston court determined that:

> "It was not intended by the district court or by this court to fix a percentage standard for determining intoxicating quality without regard to fact. What the sentence meant was that, for the purposes of the case on trial, such a liquid, when containing three or more percent of alcohol, would be considered -- this is, presumed -- to be intoxicating, in the absence of proof to the contrary.
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> . . . .
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> "Many cases have been cited wherein it has been held that beer was presumed to be intoxicating, but never one that has held that this presumption could not be contradicted by evidence. Throughout the years this has been the law as announced by this court . . . . Had the legislature been dissatisfied with that interpretation of the statute it would have been changed before this. The matter could have been settled by the legislature providing just what per cent of alcoholic content would render a beverage intoxicating. The legislature could

> easily have provided that any malt liquor should not be sold regardless of whether it was intoxicating. Neither has been done." 138 Kan. at 183. (Emphasis added).

The 1937 Kansas legislature responded to the above-quoted Owston dicta. Prior to 1937, all beer was presumed to be intoxicating. Owston reiterated this rule. In 1937, the legislature defined "intoxicating liquor" as excluding 3.2% beer. L. 1937, ch. 214, now codified as K.S.A. 41-2701 et seq. This legislation was not affected by the 1948 constitutional amendment to Kansas prohibition (Article 15, § 10 of the Kansas Constitution, as adopted by the people of Kansas on November 2, 1948), nor the 1949 Kansas Liquor Control Act (L.1949, ch. 242, §§ 1-125). The "3.2% CMB" laws have been upheld before and after the 1948 "open saloon" constitutional provision. See Johnson v. Reno County Commissioners, 147 Kan. 211, 216 (1938); Horyna v. Board of County Commissioners, 194 Kan. 445 (1965); Lindquist v. City of Lindsborg, 165 Kan. 212, 216 (1948); and Schneider v. Kennedy, 225 Kan. 1, 13 (1978). "Implicit in these decisions is the conclusion that a tavern selling 3.2% beer is not an 'open saloon,' because the legislature has determined that 3.2% beer is not an 'intoxicating liquor.' And yet, will anyone deny that 3.2% beer is an intoxicating liquor?" "Wyatt Earp and the Wine List," 47 J.B.A.K. at 75.

No one can deny that 3.2% beer is intoxicating. However, the issue is not what alcoholic liquor actually is, nor what people may think it is, but that the court has allowed the legislature to define what it is, within reason. Based on this precedent, it is our opinion that the legislature has the power to redefine all beer containing less than 5% alcohol by weight as a non-intoxicating cereal malt beverage. See, e.g. Tenn. Code Ann. § 57-3-101 (1986) (excludes 5% beer from its definition of "alcoholic beverage"); Iowa Code § 123.3(a). (It should be noted that if a 5% CMB definition is challenged, the Court could set aside its earlier line of reasoning due to current societal concerns with driving under the influence, etc. If this were to happen, the legislature may lose the 3.2% definition as well.)

As a consequence of this power to define 5% beer as non-intoxicating, other issues arise, such as whether "5% CMB" may be sold at liquor stores as well as grocery stores and beer taverns. It is our opinion that this could be done,

though the statutory restrictions proscribing CMB sales in certain establishments would have to be altered by legislation, i.e. K.S.A. 41-103. Also, the question arises as to whether there are any limits to this legislative power. The legislature is limited by the standard of reasonableness. Would "5% CMB" legislation fall reasonably within the parameters of Article 15, Section 10, and 3.2% CMB case law? While a truly reasonable definition would include as an intoxicating liquor any beverage containing any alcohol that has the effect of intoxication, the applicable standard is one of mere reason, one that survives the above-cited constitutional and case law. A definition of 5% beer as cereal malt beverage, in our opinion, meets the current applicable standards.

In reference to the law in effect prior to the November, 1986 constitutional amendment and subsequent implementing legislation thereof, the issue arises as to the effect of the "open saloon" prohibition and "liquor by the drink" enactments when a person purchases a glass of beer. The argument could be made that the voters in 1948 and in November, 1986 understood at the time they cast their respective ballots that 3.2% CMB is not intoxicating. This argument is defeated by the concept that (1) everyone knows that 3.2% CMB is intoxicating, and (2) aside from fact and common knowledge, the legislature's power to change the percentage definitions existed both before and after each of these elections. Thus, this question has no bearing on the power of the legislature to define CMB.

CMB sales used to be allowable to 18-year olds. By July 1, 1987, when any legislation regarding 5% CMB would likely go into effect, only those persons 21 years and older will be able to purchase CMB or other intoxicants. See K.S.A. 41-2701(g). Again, though persuasive in determining whether 5% beer should be classified as a CMB, this issue has no bearing on the question of the legislature's ability to define 5% beer as a CMB.

In conclusion, the Kansas Supreme Court has never defined "intoxicating liquor" for purposes of Art. 15, § Sec. 10 of the Kansas Constitution. The Kansas Supreme Court in Owston indicated that the legislature may define intoxicating liquor and cereal malt beverage, within reason. Kansas courts have not found the legislature's definition of 3.2% beer as non-intoxicating to be invalid.

Based upon the preceding, it is our opinion that the Kansas legislature has the power to define all beer containing less than 5% alcohol by weight as a non-intoxicating cereal malt beverage (CMB). The legislature may allow the sale of this "5% CMB" by all entities which currently sell CMB, as well as by retail liquor stores currently restricted to the sale of "strong" beer.

Very truly yours,

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