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December 22, 2011

ATTORNEY GENERAL OPINION NO. 2011- 21

Honorable Bob Bethell
State Representative, 113th District
104 E. Third, P.O. Box 186
Arden, Kansas 67512

Re: Constitution of the United States–Supremacy Clause; Federal Preemption of State Law

Intoxicating Liquors and Beverages–Licensing and Related Provisions; City Option–Farm Winery License; Authority of Licensee

Synopsis: In conclusion, it is our opinion that unless a Kansas farm winery qualifies under the "grandfather" clause found in 27 C.F.R. §4.23(b), K.S.A. 2010 Supp. 41-308a(c) is impliedly preempted by federal regulation as it relates to the percentage of grape variety required to label a wine with Kansas as an appellation of origin. Cited herein: K.S.A. 41-308a, 27 C.F.R. §4.23, U.S. Const., Art. VI, Clause 2.

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Dear Representative Bethell:

As Representative for the 113th District, you ask for an Attorney General Opinion clarifying whether K.S.A 41-308a or 27 C.F.R. §4.23 controls when there is an apparent conflict between the two laws regarding wine labeling.

K.S.A. 2010 Supp. 41-308a(c) requires a Kansas farm winery to use 60% Kansas products and provide a statement on each label of domestic wine that the majority of the products used in the manufacture of the wine were grown in Kansas.[1] However, federal

[1]K.S.A. 2010 Supp. 41-308a outlines the requirements for labeling farm winery wines and provides, "[N]ot less than 60% of the products utilized in the manufacture of domestic table wine and domestic fortified wine by a farm winery shall be grown in Kansas except when a lesser proportion is authorized by the

regulations require that if a wine label signifies an appellation of origin (i.e., Kansas), 75% of the grape variety of the wine in the bottle must come from the area specified as the appellation of origin.[2] It should be noted that the federal regulation contains a "grandfather" clause which exempts from the federal regulation's prohibition an otherwise misleading geographic brand name if the brand name was in use prior to July 7, 1986, and the front label also discloses the true geographic source of the grapes used to make the wine contained in the bottle.[3]

The question of law that you raise is a question of federal preemption. The doctrine of federal preemption is a rule of priority founded on the Supremacy Clause of the United States Constitution, in Article VI, Clause. 2, which states:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Congress has the power to preempt state law concerning matters that lie within the authority of Congress.[4] In determining whether federal law preempts state law, a court's task is to discern congressional intent.[5] Congress's express intent is found when Congress explicitly states that it is preempting state authority.[6] Congress's implied intent to preempt is found (i) when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law;[7] (ii) when a conflict exists where compliance with both federal and state regulations is an impossibility;[8] or (iii) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[9]

In your inquiry, both the federal and state laws regulate the same area of law—wine labeling. The Federal Alcohol Administration Act or FAA Act[10] was enacted by Congress in 1935 to bar misleading statements on wine labels and requires federal approval of each label via a certificate of label approval (COLA) before that label may be used in interstate or foreign commerce.[11] It is clear that Congress has not expressly preempted state authority with respect to the regulation of wine generally, or with

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director based upon the director's findings and judgment. The label of domestic wine and domestic fortified wine shall indicate that a majority of the products utilized in the manufacture of the wine at such winery were grown in Kansas."

[2] 27 C.F.R. §4.23(b) provides, "[E]xcept as provided in paragraph (c) of this section, the name of a single grape variety may be used as the type designation if not less than 75 percent of the wine is derived from grapes of that variety, the entire 75 percent of which was grown in the labeled appellation of origin area."

[3] Id., § 4.39(i)(2)(ii).

[4] *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000).

[5] *English v. General Elec. Co.*, 496 U.S. 72, 78–79 (1990).

[6] *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977).

[7] *Rice v. Santa Fe Elevator Corp*. 331 U.S. 218, 230 (1947).

[8] *Florida Avocado Growers v. Paul,* 373 U.S. 132, 142–143 (1963).

[9] *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

[10] 27 U.S.C. §201 *et seq*.

[11] 27 U.S.C. §205(e).

respect to wine labels in particular because there is no explicit language preempting the state's authority. Additionally, a contention that Congress intended to occupy the entire field of regulation, leaving no room for the states to supplement the law is not supported by the language in the FAA Act.[12]

Your inquiry acknowledges a conflict between state and federal law. A Kansas farm winery that only complies with the labeling standard set out in Kansas law would not be in compliance with the more restrictive labeling standard set out in federal law, unless the farm winery qualifies under the grandfather clause. To that extent, the federal labeling law preempts the Kansas labeling law for a Kansas farm winery. Any "state law that conflicts with federal law is 'without effect.' "[13]

In conclusion, it is our opinion that unless a Kansas farm winery qualifies under the "grandfather" clause found in 27 C.F.R. §4.23(b), K.S.A. 2010 Supp. 41-308a(c) is impliedly preempted by federal regulation as it relates to the percentage of grape variety required to label a wine with Kansas as an appellation of origin.

Sincerely,

Derek Schmidt
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[12] *Bronco Wine Co. v. Jolly*, 33 Cal. 4th 943, 975 (2004).
[13] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).