

Colorado Liquor Enforcement Division
Trade Practices Sub-Group
Meeting #2 – July 20, 2016

- I. Minutes from last meeting
 - a. Approved as presented

- II. Discussion of Issues
 - a. Display Items
 - i. Dave Reitz will email the Burmania letter to the group
 - ii. Jim Schpall to draft rule language
 - iii. The group also discussed adding language to exclude all employees and how to document the giveaways.

 - b. Hand Sales
 - i. Ron asked the group to look at the rule draft included in the packet, make any changes and to prepare to discuss at the next meeting.

 - c. Sampling
 - i. It was agreed by the group that this may be a solution in search of a problem. Patrick would like to discuss further.

 - d. Cumulative Discounts
 - i. This was taken off the Trade Practice sub group list of discussion items.

 - e. Control Issues
 - i. Equipment
 - 1. It was agreed that more information is needed, but most wanted to explore banning of all equipment rentals from a supplier/wholesaler – more discussion needed

 - ii. Laid-In Costs
 - 1. This issue was tabled for further discussion at the next meeting.

 - iii. Advertising Funding

 - iv. Stocking & Labor

 - v. Promo Logo Items – Cost Sharing
 - 1. The above three items Stephanie Fransen agreed to draft language for all three items.
 - 2. The group will look at other states best practices on these issues and will review federal laws and restrictions (need to do more research).

- vi. Warehousing
 - 1. Didn't seem to be an issue the group wanted to pursue.
- vii. Control
 - 1. Ron will ask Lynda Atkins, the AG for Liquor to review the definition of control or attempt to control and the case law for Nobel Foods and Wine & Spirits Wholesalers.
 - 2. Further discussion at next meeting.

III. Organization Matters

Present at the Meeting:

Jeanne McAvoy	Jim Shpall
Kim Abbott	Stephanie Fransen
Nick Hoover	Michael Steppat
Mickey Petrollini	David Reitz
Laura Long	Micki Hackenberger
Joan Green	Andrew Lemley
Jenn Penn	

Present via Phone:

John Tipton	John Carlson
Tyler Rudd	

The next sub group meeting will be held on Thursday, August 4 from 9:00 – 11:00 am at the Colorado Restaurant Association located at 430 E 7th Ave, Denver, CO 80203

Attachments:

Hand Sales Draft Language
Laid-in Cost Language by CBDA
Burmania Display Letter
Shpall Draft Regulation on Display Items
Noble Case Summary
Wine & Spirits Wholesalers Case Summary

HAND SALES DRAFT LANGUAGE

47-322(B)

- 3. SUPPLIER-SPONSORED CONSUMER GIVE-AWAY OF ALCOHOL BEVERAGES THAT IS HELD IN ESTABLISHMENTS LICENSED FOR OFF-PREMISES CONSUMPTION FOR THE PURPOSE OF PRODUCT SALES PROMOTION, ARE PERMITTED UNDER THE FOLLOWING CONDITIONS:**
 - a. PRODUCT USED FOR GIVE-AWAY MUST BE INVOICED BY A LICENSEE, WHO IS AUTHORIZED TO SELL ALCOHOL BEVERAGES AT WHOLESALE TO LICENSED RETAILERS PURSUANT TO ARTICLE 46 OR 47 OF TITLE 12, AS IF SOLD TO THE RETAILER.**
 - b. A RETAILER MAY NOT IMPOSE ANY CHARGE TO THE CONSUMER TO ENTER OR PARTICIPATE IN THE GIVE-AWAY.**
 - c. IF ALL PRODUCT LISTED IN THE SALES INVOICE IS USED AS PERMITTED HEREIN, THE WHOLESALER MUST ISSUE THE RETAILER A CREDIT AGAINST THE ENTIRE AMOUNT OF THE ORIGINAL INVOICE. IF THE SUPPLIER-SPONSORED CONSUMER GIVE-AWAY IS CONDUCTED BY A LICENSEE OTHER THAN THE COLORADO LICENSED WHOLESALER OF THE PRODUCT, THEN THE SUPPLIER LICENSEE MUST ISSUE THE WHOLESALER A CREDIT AGAINST THE ENTIRE AMOUNT OF THE ORIGINAL INVOICE, AND THE WHOLESALER MUST ISSUE THE RETAILER THE CREDIT FROM THE SUPPLIER AGAINST THE ENTIRE AMOUNT OF THE ORIGINAL INVOICE.**
 - d. ANY REMAINING PRODUCT MUST BE RETURNED TO THE COLORADO LICENSED WHOLESALER OF THE PRODUCT, OR SOLD TO THE RETAILER AT A MINIMUM OF THE WHOLESALER'S LAID IN COST.**
 - e. SUPPLIER REPRESENTATIVES OR THEIR AUTHORIZED AGENTS MAY PROVIDE ALCOHOL BEVERAGE SAMPLES DIRECTLY TO THE CONSUMER, IF THE PRODUCT HAS BEEN DELIVERED TO THE RETAIL PREMISES PURSUANT TO THE CONDITIONS DESCRIBED HEREIN, AND THE RETAILER HAS SO CONSENTED. CONSUMER SAMPLES PROVIDED UNDER THIS SECTION SHALL BE PURCHASED DIRECTLY FROM THE RETAILER BY THE SUPPLIER'S REPRESENTATIVE. ALL SAMPLE PURCHASES MUST BE AT THE RETAILER'S CURRENT RETAIL PRICE INCLUDING SALES TAXES.**
 - f. SUPPLIERS MAY PROVIDE OR PAY FOR ANY MEDIA ANNOUNCEMENT OF A SUPPLIER-SPONSORED CONSUMER GIVE-AWAY THAT PRIMARILY ADVERTISES THE PRODUCT, THE LOCATION, AND THE DATE AND TIME OF THE GIVE-AWAY. THE NAME OF THE RETAIL OUTLET MAY ALSO BE MENTIONED.**

Laid-in Cost Language Provided by CBDA

Example Language: An in-state manufacturer's laid-in cost is defined (as the Lowest laid in cost of the Colorado independent beer distributor that the manufacturer sells to, or if the manufacturer does not sell to a distributor the cost will be defined as the total ordinary expenses reported on the financial statements used on their Colorado state tax return) plus applicable state and federal taxes.

STATE OF COLORADO

DEPARTMENT OF REVENUE

Liquor Enforcement Division
1881 Pierce Street, Suite 108A
Lakewood, Colorado 80214
Phone (303) 205-2300
FAX (303) 205-2341

E-mail: DOR_led@state.co.us

Website: www.colorado.gov/revenue/liquor



John Hickenlooper
Governor

Barbara J. Brohl
Executive Director

Don Burmania
Division Director

August 20, 2013

Dear Licensed Supplier,

The Division has reviewed the placement of umbrellas and other display items with another utilitarian value as consumer giveaways in retail accounts.

Under Regulation 47-316(B)(3), a supplier may advertise, within retail premises, consumer giveaways, sweepstakes and contests. Under Regulation 47-320(D), a supplier's standard interior display can only be provided free of charge if it has no other utilitarian value. The Division in the past has determined that umbrellas could not be provided free of charge to retail accounts because they have another utilitarian value.

In order to prevent suppliers from circumventing Regulation 47-320(D) by continually providing free of charge to retailers items with another utilitarian value as consumer giveaways, the Division has established these policies for the display of items as part of a consumer giveaway, sweepstakes or contest.

1. The item must be properly identified in signage as a prize as part of a consumer giveaway, sweepstakes or contest, e.g. "Win this Umbrella."
2. Signage must also display the starting date of the drawing or contest period, the drawing or contest ending date and time, and the fact that the item is the property of the supplier.
- 3. The contest and drawing period cannot last longer than 30 days, and no similar item can be displayed and given away at a retail establishment more than once during a six-month period.
4. The supplier is responsible for removing the display item at the completion of the drawing or contest and awarding the item to the winner. The retailer and its employees are not eligible to receive or award the prize.
- 5. An invoice must be left with the retailer showing that the display item is the property of the supplier and showing the delivery date.
6. Failure to comply with this policy shall be considered a violation of Regulation 47-320(D).

If you have any questions regarding this advisement, please contact Patrick Maroney, Chief of Investigations, at (303) 205-2927.

Sincerely,

A handwritten signature in cursive script that reads "Don Burmania".

Don Burmania
Director
Colorado Liquor Enforcement Division

Jim Shpall Draft Regulation on Display Items

Regulation 47-316(B)

3. A supplier may advertise, within retail premises, alcohol beverage products, consumer mail-in rebate offers, consumer giveaways, sweepstakes, contests, and cross promotions with non-alcohol beverage products. Suppliers may also provide contest and sweepstakes information and consumer entry forms. Further, suppliers may provide items, subject to the regulations below, to be given away in a consumer giveaway, sweepstake or contest.

For consumer giveaways, sweepstake or contests, (collectively "Consumer Contest") the following regulations shall apply:

- a. No item provided as part of a Consumer Contest may be awarded to, received by or otherwise kept by the licensee or any of the licensee's employees or an employee's immediate family members.
- b. No item provided as part of a Consumer Contest may be awarded to, received by or otherwise kept by a supplier licensee that is providing alcohol beverage products to the retail licensee or any of the supplier licensee's employees or any supplier licensee's employee's immediate family members.
- c. Any item(s) to be given away in a Consumer Contest must be awarded and given to the winning consumer or otherwise returned to the supplier at the end of the Contest date which date shall be clearly posted as a part of the Consumer Contest rules.
- d. The actual item(s) that is(are) part of the Consumer Contest shall be delivered to the retail license premises together with an invoice made out to the retail licensee for not less than the actual fair market value cost of the item(s). The retail licensee shall be responsible for and required to pay the invoice cost for the item unless the retail licensee can establish to the satisfaction of the Liquor Enforcement Division that the item(s) was(were) in fact presented to the winning consumer in accordance with the rules of the Consumer Contest. Both the retail licensee and the supplier of the item shall each maintain in their respective records proof establishing that the item(s) was(were) delivered to the winning consumer. Such records shall include but not be limited to a signed acknowledgement of receipt of the item(s) by the winning consumer which acknowledgment shall include a valid form of identification proving the identity of the consumer, the consumer's name, address, phone number, e-mail address (if available) and the date on which the item was presented to the consumer. In addition, the records shall include the name and position of the person or persons presenting the item to the consumer sufficient so that the Liquor Enforcement Division can verify that the item was presented to the Consumer Contest winner.

- e. In the event that the supplier does not have the signed acknowledgement of receipt from the consumer within 30 days of the end of the Consumer Contest, supplier shall be required to obtain payment in full of the invoice by the retail licensee for the item(s). Absent payment within 24 hours of the expiration of the 30 day period, no supplier representing the brand advertised in the Consumer Contest shall be permitted to sell or otherwise provide any product to the retail licensee until the invoice is paid in full.
- f. The Consumer Contest, including the drawing period, shall not last longer than 30 days.
- g. The actual item(s) that is(are) part of the Consumer Contest may be displayed in the licensed premises only during the period of the Consumer Contest and for a period not to exceed the shorter of 30 days following the end of the Consumer Contest period or the delivery of the item(s) to the Consumer Contest winner.
- h. The item(s) must be properly identified in signage as a prize that is part of the Consumer Contest, e.g. "Win this Corvette".
- i. Signage shall display the starting date and ending date of the Consumer Contest and all other relevant terms and conditions of the Consumer Contest.
- j. Failure to comply with this Regulation shall be considered a violation of the Regulation.

Nobel, Inc. v. Colorado Dep't of Revenue

Court of Appeals of Colorado, Division Three

April 22, 1982

No. 81CA0982

Reporter

652 P.2d 1084; 1982 Colo. App. LEXIS 856

NOBEL, INC., a Colorado corporation, Plaintiff-Appellant, v. COLORADO DEPARTMENT OF REVENUE, Alan Charnes, Liquor Enforcement Division of the Colorado Department of Revenue, and Marvin D. Eller, Liquor Control Chief, Defendants-Appellees

Subsequent History: **[**1]** Rehearing Denied May 27, 1982; Review Denied October 25, 1982.

Prior History: Appeal from the District Court of the City and County of Denver. Honorable Robert T. Kingsley, Judge.

Disposition: Judgment Reversed.

Core Terms

retail licensee, wholesale, license, lease, liquor, retail, liquor licensee, extend credit, transactions, restaurant, selling, sale of alcoholic beverages, financial assistance, installment sale, kitchen utensils, district court, liquor license, credit sale, unaccompanied, declaratory, dishwasher, provisions, regulating, licensee, premises, supplied, furnish, parties, food

Case Summary

Procedural Posture

In a joined action for review of an administrative decision and a declaratory judgment that involved appellees, the Colorado Department of Revenue and officials, appellant wholesale liquor licensee sought review of a decision of the District Court, City and County of Denver (Colorado), which entered summary judgment in favor of the Department and found that the wholesale licensee had violated Colo. Rev. Stat. § 12-47-129 (1973).

Overview

The wholesale licensee held a wholesale liquor license under Colo. Rev. Stat. § 12-47-115 (1973). Under that license, the wholesale licensee sold wine in bulk containers to certain Colorado retail licensees. The wholesale licensee's primary business was selling food supplies and selling or leasing kitchen equipment and utensils to restaurants and institutions. The wholesale licensee leased a dishwasher to a restaurant and sold kitchen utensils to a motel on an installment sale basis. Both the lessee of the dishwasher and the purchaser of the utensils had hotel and restaurant licenses under Colo. Rev. Stat. § 12-47-119 (1973). An action was commenced by the Department to rescind the wholesale licensee's license because a liquor wholesaler could not extend credit or lease equipment to any establishment holding a retail liquor license. In reversing the trial court's decision, the court found that because the extension of credit involved in the transactions in issue was unaccompanied by control or attempt to control the retail licensee, there was no violation of Colo. Rev. Stat. § 12-47-129 (1973).

Outcome

The court reversed the judgment of the trial court.

LexisNexis® Headnotes

Governments > State & Territorial Governments > Licenses

HN1 See Colo. Rev. Stat. § 12-47-129 (1973).

Governments > State & Territorial Governments > Licenses

HN2 Extension of credit unaccompanied by control or attempt to control is not unlawful under the Colorado Liquor law. It is clear that the validity of credit sales is recognized by Colo. Rev. Stat. § 12-47-129 (1973).

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Contracts Law > Personal Property > Personalty Leases > General Overview

Contracts Law > Personal Property > Personalty Leases > Installment Lease Contracts

Governments > State & Territorial Governments > Licenses

HN3 Absent proof of control or attempt to control a retail licensee by a wholesale liquor licensee, an installment sale or lease of equipment by a wholesaler to a retailer is not prohibited by statute.

Counsel: Bradley, Campbell & Carney, P.C., Earle D. Bellamy, II, Victor F. Boog, Golden, Colorado, Attorneys for Plaintiff-Appellant.

J. D. MacFarlane, Attorney General, Richard F. Hennessey, Deputy Attorney General, Mary J. Mullarkey, Assistant Attorney General, Roger Morris, Assistant Attorney General, Denver, Colorado, Attorneys for Defendants-Appellees.

Judges: Judge Stenberg, Judge Kirshbaum and Judge Tursi, concur.

Opinion by: STERNBERG

Opinion

[*1084] The determinative issue in this appeal is whether the leasing of equipment and the sale of equipment on credit by a wholesale liquor licensee to a retail liquor licensee, absent control or attempt to control the retail licensee, constitutes unlawful financial assistance as proscribed by § 12-47-129, C.R.S. 1973 (1978 Repl. Vol. 5). We hold that because the extension of credit involved in the transactions in issue was unaccompanied by control or attempt to control the retail licensee, there is no violation of that statute. Therefore, [*2] we reverse the trial court which held otherwise.

Plaintiff Nobel, Inc., holds a wholesale liquor license under § 12-47-115, C.R.S. 1973 (1978 Repl. Vol. 5). Under that license, it sells wine in bulk containers to certain Colorado retail licensees. Nobel's primary business, however, is selling food supplies and selling or leasing kitchen equipment and utensils to restaurants and institutions throughout the state.

Two separate transactions leading to this suit took place. First Nobel leased a dishwasher to a restaurant, and later Nobel sold kitchen utensils to a motel on an installment sale basis. Both the lessee of the dishwasher and the purchaser of the kitchen utensils have hotel and restaurant licenses under § 12-47-119, C.R.S. 1973 (1978 Repl. Vol. 5).

Thereafter, the liquor enforcement division of the Colorado Department of Revenue informed Nobel that as a liquor wholesaler it could not extend credit or lease equipment to any establishment holding a retail liquor license, and commenced an action to rescind Nobel's license. A hearing was conducted before an administrative officer who concluded that, except with respect to sale of alcoholic beverages, wherever [*1085] [**3] a wholesale liquor licensee is in the position of creditor to a retail licensee, the statute is violated, even though no control or attempt to control the retail licensee is shown.

Earlier Nobel had filed a declaratory judgment action seeking a determination that the two transactions in question did not violate the statute. The action for review of the administrative decision and the declaratory judgment suit were joined in the district court action. The Department of Revenue moved for summary judgment, and the district court granted the motion.

The statute in issue, § 12-47-129, C.R.S. 1973 (1978 Repl. Vol. 5) provides in pertinent part:

HN1 "(3) It is unlawful for any of the persons or parties described or referred to in subsections (1) and (2) of this section to furnish, supply, or loan, in any manner, directly or indirectly, to any person licensed to sell at retail pursuant to the provisions of this article any financial assistance or any equipment, fixtures, chattels, or furnishings used in the storing, handling, serving, or dispensing of food or alcoholic beverages within the premises or for making any structural alterations or improvements in or on the building on which [***4] such premises are located

(9) This section is intended to prohibit and prevent the *control* of the outlets for the sale of alcoholic beverages by any persons or parties other than the persons licensed pursuant to the provisions of this article." (emphasis supplied)

In Majestic Marketing Co. v. Anderson Enterprises, 32 Colo. App. 369, 511 P.2d 943 (1973), involving an attempt by a retail licensee to use the above statute as a shield to an action brought against it by a wholesale licensee to collect on a promissory note, this court stated:

HN2 "Extension of credit unaccompanied by control or attempt to control is not unlawful under the Colorado Liquor law It is clear that the validity of credit sales is recognized by the statute."

While the factual background of the instant case differs from *Majestic*, nevertheless, we see no reason to interpret the statute any differently or more restrictively than this court did in *Majestic*. C.R.S. 1963, 75-2-6, the predecessor of the current statute was involved in *Majestic*. The General Assembly has reenacted that statute and made minor changes therein but has not changed the section interpreted [**5] in *Majestic*. Thus, "it must be concluded that the legislature has agreed with the judicial construction." *Music City, Inc. v. Estate of Duncan*, 185 Colo. 245, 523 P.2d 983 (1974). And, contrary to the licensing authority's argument, the fact that other amendments to the liquor code have taken away the authority of the Department to make regulations

regulating credit sales does not require us to interpret the controlling statute any differently than did this court in *Majestic*.

Consequently, we hold that, *HN3* absent proof of control or attempt to control a retail licensee by a wholesale licensee, an installment sale or lease of equipment by a wholesaler to a retailer is not prohibited by statute.

Judgment reversed.

JUDGE KIRSHBAUM and JUDGE TURSI, concur.



Wine & Spirits Wholesalers v. Colorado Dep't of Revenue, Liquor Enforcement Div.

Court of Appeals of Colorado, Division Three

May 2, 1996, Decided

No. 94CA1722

Reporter

919 P.2d 894; 1996 Colo. App. LEXIS 144; 20 BTR 718

Wine and Spirits Wholesalers of Colorado, Inc., Plaintiff-Appellant, v. Colorado Department of Revenue, Liquor Enforcement Division, Defendant-Appellee.

Subsequent History: [**] Released For Publication July 17, 1996.

Prior History: Appeal from the District Court of the City and County of Denver. Honorable Robert S. Hyatt, Judge. No. 94CV1654.

Disposition: JUDGMENT AFFIRMED

Core Terms

retail, regulation, wholesalers, liquor, manufacturer, sales, alcoholic beverage, rulemaking, financial assistance, licensed, below-cost, licensee, products

Case Summary

Procedural Posture

Plaintiff liquor wholesalers sought review of the order from the Denver County District Court (Colorado), which affirmed the adoption by defendant, Liquor Enforcement Division of the Colorado Department of Revenue, of regulations prohibiting manufacturers, wholesalers, and importers of alcohol from selling alcoholic beverages to retailers below cost.

Overview

The Liquor Enforcement Division of the Colorado Department of Revenue adopted a regulation prohibiting manufacturers, wholesalers, and importers of alcohol from selling alcoholic beverages to retailers below cost. The liquor wholesaler filed an action seeking judicial review and the trial court affirmed the adoption of the regulation. On

appeal, the court held that the General Assembly had not, either explicitly or implicitly, required that a grantor of financial assistance or credit must have intended to gain influence or control over a liquor retailer before the financial assistance was unlawful. The court held that the Liquor Enforcement Division properly based its action primarily on policy considerations without providing any factual support and could have rejected any adverse submissions by the public and adopted its rule so long as it was reasonable to do so. The court held that [Colo. Rev. Stat. § 12-47-105](#) granted the Liquor Enforcement Division broad discretion in regulating the liquor industry and affirmed the judgment.

Outcome

The court affirmed the order from the trial court affirming the adoption of the regulation.

LexisNexis® Headnotes

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Formal Rulemaking

Energy & Utilities Law > Utility Companies > General Overview

HNI Any rules and regulations that a state agency adopts pursuant to a statutory rulemaking proceeding are presumed valid. Accordingly, plaintiff has the burden of establishing their invalidity by demonstrating that the rulemaking body acted in an unconstitutional manner, exceeded its statutory authority, or otherwise acted in a manner contrary to statutory requirements. [Colo. Rev. Stat. § 24-4-106\(7\)](#) (1988).

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

HN2 A reviewing court may not substitute its judgment for that of the administrative agency. And, an agency's construction of its own governing statute is entitled to great weight.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Separation of Powers > Legislative Controls > General Overview

HN3 When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether the legislature has directly spoken to the precise question at issue. If the intent of the legislature is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of the legislature. If, however, the court determines the legislature has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. If the legislature has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

Governments > State & Territorial Governments > Licenses

Real Property Law > Fixtures & Improvements > Fixture Characteristics

HN4 Colo. Rev. Stat. § 12-47-129(3)(a) states that it is unlawful for any manufacturers, wholesalers, limited winery licensees, or any persons with a financial interest in such entities to furnish, supply, or loan, in any manner, directly or indirectly, to any person licensed to sell at retail pursuant to the provisions of this article any financial assistance or any equipment, fixtures, chattels, or furnishings used in the storing, handling, serving, or dispensing of food or alcoholic beverages within the premises or for making any structural alterations or improvements in or on the building on which such premises are located.

Governments > State & Territorial Governments > Licenses

HN5 Colo. Rev. Stat. § 12-47-129(7) states that it is unlawful for any owner, part owner, shareholder, stockholder, or person interested, directly or indirectly, in any retail business or establishment of a person licensed to sell at retail pursuant to the provisions of this article to enter into any agreement with any person or party or to receive, possess, or accept any money, fixtures, supplies, or things of value from any person or party, whereby a person licensed to sell at retail pursuant to this article may be influenced or caused, directly or indirectly, to buy, sell, dispense, or handle the product of any manufacturer of alcoholic beverages.

Criminal Law & Procedure > Criminal Offenses > Alcohol Related Offenses > General Overview

Criminal Law & Procedure > ... > Alcohol Related Offenses > Distribution & Sale > General Overview

Criminal Law & Procedure > ... > Alcohol Related Offenses > Distribution & Sale > Elements

Governments > State & Territorial Governments > Licenses

HN6 Colo. Rev. Stat. § 12-47-129(9) provides that this section is intended to prohibit and prevent the control of the outlets for the sale of alcoholic beverages by any persons or parties other than the persons licensed pursuant to the provisions of this article.

Counsel: Denman & Corbetta, P.C., Richard L. Corbetta, Steven H. Denman, Denver, Colorado; Ted J. Trimpa, Denver, Colorado, for Plaintiff-Appellant.

Gale A. Norton, Attorney General, Stephen K. Erkenbrack, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Clifton D. Hypsher, Assistant Attorney General, Denver, Colorado, for Defendant-Appellee.

Judges: Opinion by JUDGE ROY. Plank and Ney, JJ., concur.

Opinion by: ROY

Opinion

[*895] Plaintiff, Wine and Spirits Wholesalers of Colorado, Inc., appeals from a judgment of the trial court affirming the adoption by defendant, the Liquor Enforcement Division of the Colorado Department of Revenue, of a regulation prohibiting manufacturers, wholesalers, and importers of alcohol from selling alcoholic beverages to retailers below cost. We affirm.

The facts are not in dispute. Defendant, an administrative agency of the state, [*896] adopted a rule prohibiting the sale of liquor below cost to retailers by manufacturers, wholesalers, [*2] and importers. Defendant adopted the rule pursuant to §§ 12-47- 105(1)(b) and 12-47-105(2)(a), C.R.S. (1991 Repl. Vol. 5B), which grant defendant broad rulemaking powers, including prohibiting unfair practices and unfair competition; and §§ 12-47-129(3) and 12-47-129(7), C.R.S. (1991 Repl. Vol. 5B), which prohibit manufacturers and wholesalers from owning an interest in, or providing financial assistance to, retailers.

The regulation went into effect March 2, 1994, and provides in pertinent part:

Manufacturers, wholesalers and importers and their agents or employees may not attempt to control a retail licensee's product purchase selection by engaging in unfair trade practices or competition. Retailers may not solicit or accept, and manufacturers, wholesalers and importers ('suppliers') are prohibited from directly or indirectly engaging in the following unfair practices:

A. Sales of Alcoholic Beverages Below Cost.

1. No vinous or spirituous liquors may be sold by a vinous or spirituous liquor manufacturer or wholesaler to a retail licensee below the laid-in cost of said vinous and spirituous liquor products.

2. No malt liquors may be sold by a malt liquor manufacturer or wholesaler [*3] to a retail licensee below the laid-in cost of said malt liquor products.

....

4. Certain sales of alcoholic beverages below cost are not designed or intended to influence or control a retailer's product purchase selection. The following exceptions to below cost product sales are therefore permitted:

a. Product lines that will be discontinued for a minimum of at least one year may be sold below cost at market value.

b. Products for use, but not for resale, by a non-profit organization or similar group, on a retailer's licensed premises, may be invoiced to a retailer at no cost. The invoice for said products must detail the products provided and the group for whose benefit it is provided. At the conclusion of the organization's event any unused product must be returned to the manufacturer or wholesaler, or invoiced at a minimum of cost to the retailer.

... Department of Revenue Regulation No. 47-129.4A, 1 Code Colo. Reg. 203-2.

On April 1, 1994, plaintiff commenced this action in the district court seeking judicial review pursuant to § 24-4-106, C.R.S. (1988 Repl. Vol. 10A), and a declaratory judgment under C.R.C.P. 57. The trial court upheld the regulation, stating that: [*4] "The agency did not act in an unconstitutional manner, did not exceed its statutory authority, and did not otherwise act in a manner contrary to statutory requirements in promulgating the regulation." The trial court further held that the agency action was reasonable and supported by evidence in the record. This appeal followed.

I.

Plaintiff first contends that defendant acted beyond its statutory authority because the plain meaning of the statute requires that a manufacturer or wholesaler intend to control a retailer when providing financial assistance by making below-cost sales. Therefore, because the regulation makes financial assistance by below-cost sales a per se or strict liability violation, it is contrary to the express intent of the General Assembly. We disagree with plaintiff's contention.

The General Assembly has, in § 12-47-105, expressly delegated to defendant authority to promulgate rules and regulations concerning the liquor industry.

HN1 Any rules and regulations that a state agency adopts pursuant to a statutory rulemaking proceeding are presumed valid. Regular Route Common Carrier Conference v. Public Utilities Commission, 761 P.2d 737 (Colo. 1988). Accordingly, [*5] plaintiff has the burden of establishing their invalidity by demonstrating that the rulemaking body acted [*897] in an unconstitutional manner, exceeded its statutory authority, or otherwise acted in a manner contrary to statutory requirements. Section 24-4-106(7), C.R.S. (1988 Repl. Vol. 10A); Amax, Inc. v. Colorado Water Quality Control Commission, 790 P.2d 879 (Colo. App. 1989).

HN2 A reviewing court may not substitute its judgment for that of the administrative agency. And, an agency's construction of its own governing statute is entitled to great weight. Amax, Inc. v. Colorado Quality Control Commission, supra.

In Citizens for Free Enterprise v. Department of Revenue, 649 P.2d 1054 (Colo. 1982), our supreme court articulated the reasoning underlying judicial review of administrative rulemaking proceedings. Explaining the "based on the record" requirement of § 24-4-106(4), C.R.S. (1988 Repl.

Vol. 10A), the court held that the standard of review in the consideration of agency rulemaking is reasonableness. See *Amax, Inc. v. Colorado Water Quality Control Commission*, supra.

In determining the reasonableness of an agency's rulemaking, we find the reasoning of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82, 81 L. Ed. 2d 694, 702-03 (1984), particularly persuasive:

HN3 When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether [the legislature] has directly spoken to the precise question at issue. If the intent of [the legislature] is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of [the legislature]. If, however, the court determines [the legislature] has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . If [the legislature] has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute [*7] by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. See *J.R. Simplot Co. v. Idaho State Tax Commission*, 120 Idaho 849, 820 P.2d 1206 (1991) (adopting Chevron for review of state agency rulemaking); *Church v. State*, 164 Ill. 2d 153, 646 N.E.2d 572, 207 Ill. Dec. 6 (1995) (same); *Moore v. Gencorp, Inc.*, 633 So. 2d 1268 (La. 1994) (same); *Columbus & Franklin County Metropolitan Park District v. Shank*, 65 Ohio St. 3d 86, 600 N.E.2d 1042 (1992) (same); *Morton International, Inc. v. Auditing Division*, 814 P.2d 581 (Utah 1991) (same); see also *Henning v. Industrial Welfare Commission*, 46 Cal. 3d 1262, 252 Cal. Rptr. 278, 762 P.2d 442 (1988) (Broussard, J., concurring) (adopting Chevron analysis).

II.

Following the Chevron analysis, we must first decide whether the General Assembly has spoken on the precise question concerning the illegality [*8] of below-cost sales.

Section 12-47-129(3), one of the specific statutes that defendant relied upon in banning below-cost sales, states in relevant part:

HN4 (a) It is unlawful for any [manufacturers, wholesalers, limited winery licensees, or any persons with a financial interest in such entities] . . . to furnish, supply, or loan, in any manner, directly or indirectly, to any person licensed to sell at retail pursuant to the provisions of this article any financial assistance or any equipment, fixtures, chattels, or furnishings used in the storing, handling, serving, or dispensing of food or alcoholic beverages within the premises or for making any structural alterations or improvements in or on the [*898] building on which such premises are located. . . . The other statute underlying the regulation, **HN5** § 12-47-129(7), states:

It is unlawful for any owner, part owner, shareholder, stockholder, or person interested, directly or indirectly, in any retail business or establishment of a person licensed to sell at retail pursuant to the provisions of this article to enter into any agreement with any person or party or to receive, possess, or accept any money, fixtures, supplies, or things of value [*9] from any person or party, whereby a person licensed to sell at retail pursuant to this article may be influenced or caused, directly or indirectly, to buy, sell, dispense, or handle the product of any manufacturer of alcoholic beverages. . . .

A plain reading of these statutes demonstrates that the General Assembly did not speak to the precise question of below-cost sales. See *Dunton v. People*, 898 P.2d 571 (Colo. 1995).

Nevertheless, plaintiff argues that § 12-47-129(9), C.R.S. (1991 Repl. Vol. 5B) injects an intent element into the unlawful acts delineated in §§ 12-47-129(1) through (7), that is, as pertinent here, financial assistance is unlawful only if it can be shown that the manufacturer or wholesaler intended to influence or control the retailer. We disagree.

HN6 Section 12-47-129(9) provides:

This section is intended to prohibit and prevent the control of the outlets for the sale of alcoholic beverages by any persons or parties other than the persons licensed pursuant to the provisions of this article.

We interpret § 12-47-129(9) in accordance with its plain meaning as a statement of legislative intent to assist the

agency and the courts in construing and applying the [**10] statute in determining whether the act in question is unlawful under the broadly worded definitions of unlawful acts set forth in the preceding subsections of § 12-47-129. Section 12-47-129(9) is an admonishment that the General Assembly, in enacting the specific unlawful acts contained in §§ 12-47-129(1) through (7), intended to prohibit conduct which results in, or is likely to result in, the control of retail liquor outlets by wholesalers, manufacturers, or other licensees. There is no reference to the intent of the actor contained in, or intended by, § 12-47-129(9).

Plaintiff, however, further relies, in part, on Majestic Marketing Co. v. Anderson Enterprises of Colorado, Inc., 32 Colo. App. 369, 511 P.2d 943 (1973), and Nobel, Inc. v. Colorado Department of Revenue, 652 P.2d 1084 (Colo. App. 1982), which construed and applied the statute. We do not view either case as controlling here.

Majestic dealt with a public policy defense asserted by a retailer in an action by the wholesaler to collect on a short-term line of credit for the purchase of merchandise which had been reduced to a promissory note. The court rejected the public policy defense, relying on the fact that, at [**11] that time, the statute authorized the regulatory agency to issue regulations governing "sales on credit." Later, the General Assembly repealed defendant's authority to issue regulations on credit sales of alcoholic beverages and replaced it with an express prohibition against regulating such sales. See § 12-47-105(2)(b), C.R.S. (1991 Repl. Vol. 5B); Colo. Sess. Laws 1977, ch. 160, § 2 at 720.

Nobel dealt with the lease and sale on credit of restaurant equipment to a liquor retailer by an equipment dealer which also held a wholesale liquor license. The court held that there was no unlawful financial assistance absent control, or an attempt to control, the retailer.

To the extent, if any, that Majestic Marketing Co. v. Anderson Enterprises of Colorado, Inc., *supra*, and Nobel, Inc. v. Colorado Department of Revenue, *supra*, can be read as requiring intent to control or influence a retail dealer by providing financial assistance before a violation of the statute can obtain, we decline to follow them.

In our view, the General Assembly has not, either explicitly or implicitly, required that a grantor of financial assistance or credit must intend to gain influence or control over a liquor [**12] retailer before the financial assistance is unlawful. Further, we conclude that the General Assembly has not directly spoken on [**99] the issue of below-cost sales, and under the Chevron analysis, we need not resort to

any rules of statutory construction urged upon us by the plaintiff, including legislative acquiescence to judicial interpretation and a resort to the judicial interpretation of analogous federal statutes regulating the sale and distribution of alcoholic beverages in order to resolve the matter.

III.

Next, we address and disagree with plaintiff's contention that the regulation is unreasonable.

A reviewing court should display sensitivity to the range and nature of determinations that an administrative agency must make. Postulating the types of rules promulgated by an agency as lying along a continuum, our supreme court observed that, on one end of this continuum, an agency may base rules primarily upon policy considerations, with factual determinations playing a tangential role. For such rules, specific factual support is not required, although the reasoning process that led to the adoption of the rule must be defensible. See Regular Route Common Carrier Conference v. Public [**13] Utilities Commission, *supra*.

At the opposite end of the continuum, the supreme court noted, the necessity for the rule may turn upon discrete facts capable of demonstrative proof. In that situation, the reasonableness of the agency action depends upon the presence of factual support for its determination.

Between these two extremes are the numerous agency actions that involve a combination of factual determinations and policy choices. With respect to these middle regulatory actions, a court must appropriately tailor the nature and scope of judicial review depending upon which are predominant. See Regular Route Common Carrier Conference v. Public Utilities Commission, *supra*.

Here, defendant, in our view, properly based its actions primarily upon policy considerations without providing any factual support. The defendant could reject any adverse submissions by the public and adopt its rule so long as it was reasonable to do so.

We hold that, based on the statutory authority granted to it, defendant acted reasonably and within its authority in adopting the regulation. See People v. Lowrie, 761 P.2d 778 (Colo. 1988). Section 12-47-105 grants defendant broad discretion in regulating [**14] the liquor industry. Prohibiting below-cost sales is well within defendant's authority.

Judgment affirmed.

JUDGE PLANK and JUDGE NEY concur.