[J-61-2008] [M.O. - BAER, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MALT BEVERAGES DISTRIBUTORS ASSOCIATION	: Nos. 84 & 85 MAP 2007
v.	: Appeal from the Order of the
PENNSYLVANIA LIQUOR CONTROL BOARD, OHIO SPRINGS, INC., Intervenor	: Commonwealth Court dated February 23, 2007, at 896 CD 2006, reversing the Order of the Pennsylvania Liquor Control
APPEAL OF: PENNSYLVANIA LIQUOR CONTROL BOARD	: Board dated May 3, 2006, at 04-9056

MALT BEVERAGES DISTRIBUTORS ASSOCIATION	
v.	
PENNSYLVANIA LIQUOR CONTROL BOARD, OHIO SPRINGS, INC., Intervenor	: 918 A.2d. 171 (Pa. Cmwlth. 2007)
APPEAL OF: OHIO SPRINGS, INC., Intervenor	: ARGUED: May 14, 2008

DISSENTING OPINION

MR. JUSTICE EAKIN **DECIDED: June 15, 2009**

I respectfully dissent from the majority's conclusion that an establishment selling beer for take-out while not selling for consumption on the premises does not qualify as a "retail dispenser" under the Liquor Code. Majority Slip Op., at 17. The plain language of 47 P.S. § 1-102 defines "retail dispenser" as:

> [A]ny person licensed to engage in the retail sale of malt or brewed beverages for consumption on the premises of such licensee, with the privilege of selling malt or brewed beverages in quantities not in excess of one hundred ninety-two fluid ounces in a single sale to one person, to be carried from the premises by the purchaser thereof.

Id.

This language is unambiguous and contains no restriction upon a retail dispenser's ability to sell beer for take-out, beyond the requirement that it be licensed. In fact, the majority admits that nothing in the statute's language mandates the sale of beer for on-site consumption as a prerequisite to the sale of beer for take-out, yet concludes the legislature meant to create such a requirement. Majority Slip Op., at 13-14. It bases this conclusion in part on the placement of the phrase "with the privilege [of selling beer for take-out]," which is after and set apart from the phrase, "any person licensed to engage in the retail sale of [beer] for consumption on the premises." Id., at 13 (quoting 47 P.S. § 1-102). However, the location and comma separation of the phrases do not linguistically or logically imply the grant under the latter phrase is contingent upon exercise of the rights given in first. Rather, the phrase placement simply indicates that, beyond its license to sell beer for on-site consumption, a retail dispenser is also legally licensed to sell beer for take-out.

The characterization of the ability to sell beer for take-out as a "privilege" in no way suggests that, should a retail dispenser choose not to sell beer for on-site consumption, such "privilege" is lost. In fact, § 4-442 of the Code — specifically titled "Retail dispensers' restrictions on purchases and sales" — states "a retail dispenser may … break the bulk [of its beer] upon the licensed premises and sell or dispense the same for consumption on or off the premises so licensed." 47 P.S. § 4-442(a)(1). This provision, like § 1-102, contains no requirement a retail dispenser sell beer for on-site consumption in order to sell take-out; rather, it unequivocally states the retailer has the discretion to divide its sales as it sees fit. Logically, this division may include the decision to sell all beer as take-out, some beer as take-out, or no take-out at all.

Despite the majority's specific observance that the statute's plain language creates no sale contingency, it refuses to accept what it characterizes as a "hyper-

technical interpretation given the wide-ranging ramifications" of accepting the "current loophole." Majority Slip Op., at 16. A loophole is "[a]n ambiguity, omission, or exception (as in a law or other legal document) that provides a way to avoid a rule without violating its literal requirements." Black's Law Dictionary 962 (8th ed. 2004) (emphasis added). By definition, a loophole cannot exist where there is no behavioral rule, restriction, or requirement — there is no rule being avoided here, for there is no rule on this point at all. The statute's plain language clearly does not require sales on-site, nor does it prohibit a retail dispenser from choosing to sell all its beer for take-out, and one requires no "hyper-technical," linguistic gymnastics to reach such a plain conclusion. As there is no rule or restriction, there can be no loophole, and the majority's characterization of the statute as such is misplaced.

The majority states that "if the Legislature had intended to permit retail dispensers, who do not serve alcohol at their facilities, to sell six-packs to the general public, it surely would have utilized clear language authorizing such sales in a distinct provision of the Code." Majority Slip Op., at 16. This is a misleading argument. There is no license category other than the one that allows both on-site and take-out; it provides that if you are licensed for the former, you may do the latter. If you want to sell take-out, get a retailer's license. There is no need for a separate category.

We are not talking about the authority to sell take-out, but a restriction on the authority to sell take-out. The authority exists by virtue of the license itself; it is given to every retail licensee under the statute. Appellee would have us craft an exception to that authority, and the absence of legislative attention to the exception is the telling point. That is, the rule is that one may sell take-out with this license — if on-site sales are a requirement of exercising the privilege, that is an exception to the rule and that is what should appear in a "distinct provision."

If the legislature meant to create a sale contingency, it could have done so in the plain language of the definition, restrictions, or prohibitions governing a retail dispenser;[1] however, not a single provision conditions the take-out beer sales on sales for on-site consumption. The absence of specific contingency language from all of these provisions indicates the legislature intended retail dispensers to have discretion in selling their inventory. The majority's creation of such a requirement constitutes nothing short of rewriting the statute.

The best indicator of legislative intent is the plain language of the statute. See 1 Pa.C.S. § 1921(a)-(b). The statute says the retail dispenser already has the ability to sell take-out beer, whether incident to consumption on the premises or not. This right exists, "unburdened," without statutory requirement that beer be consumed on premises. If a retail dispenser eliminates the on-premises sales, does that dispenser acquire something other dispensers do not have? No. If one has the right to sell for on-site consumption as well as take-out, and one gives up the on-site sales, are the take-out sales somehow transformed into something that did not otherwise exist? Again, no. Simply put, the issue is subtraction, not addition.

The majority suggests finding for the intervenor will effect a "momentous transformation" of the "market niche legislatively carved for the distributor," as it would allow a retailer to "act as a distributor … yet not be burdened with the restriction of selling beer only by the case." Majority Slip Op., at 15-16. This ignores the fact that retail dispensers are already permitted to distribute without such "burden." Its fear also ignores the fact that distributors distribute to retailers as well as the public. Ohio Springs will have to buy its beer from a licensed distributor in the first place —

[1] See, e.g., 47 P.S. §§ 4-442, 4-492, 4-493.

distributors will not be selling less beer because of this license. There is no transformation of the system here, much less a momentous one.

Accordingly, I believe the Commonwealth Court's holding should be reversed, and the PLCB's order approving Ohio Springs' license transfer should be affirmed.