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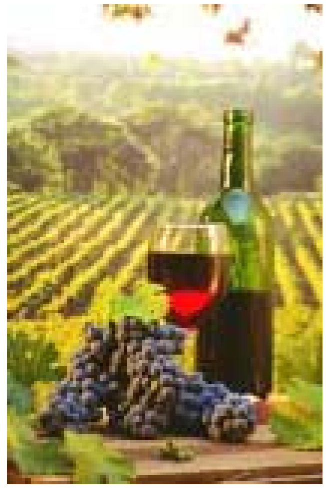

An Analysis of State Direct Wine Shipment Laws

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The Texas Wine Marketing Research Institute was established in 1988 and is part of the College of Human Sciences at Texas Tech University. The Institute's mission is to provide education, research, and service to foster the economic development and growth of the Texas wine and wine grape industry. In achieving this mission, the Institute works in cooperation with a variety of individuals and organizations including the private sector, educational organizations, and government officials. The Institute regularly collects and disseminates information concerning the industry's economic impacts on the Texas economy, wine production in Texas, wine sales, wine consumption, as well as information on wine consumers and visitors to Texas wineries.

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REPORT ABSTRACT

Prohibition was repealed in 1933 and this set in motion enactment of regulations controlling commerce in alcohol. One of the most significant forms of regulation was the "Tied House" three-tiered wholesale distribution system.

This resulted in explosive growth in wholesalers and created a highly competitive environment. However, recently consolidation has taken place with the market now controlled by a few large firms.

In contrast, the number of small wineries has increased dramatically. Wholesalers need large-volumes to remain competitive, which small wineries can not provide. States enacted legislation allowing wine producers to ship directly to consumers which many did within and without their own states. Wholesalers demanded states enforce their laws prohibiting importation of alcohol from other states. The wine industry then sought legislation to overturn the ban on direct shipment to consumers.

Recent federal court decisions have shed doubt on the authority of states to discriminate against wine producers and sellers from other states. The United State Supreme Court ruled in 2005 that the Twenty-first Amendment and the Commerce Clause should be read in harmony stating that: state laws discriminating against interstate commerce in alcohol are unconstitutional unless they relate to one of the powers reserved to them by the Twenty-first Amendment.

As a result of these court rulings, state laws are changing. However, some states still prohibit direct shipments to consumers. The problem is not one of protectionism towards abuses of alcohol, but rather towards intra-state commerce based on the legacy of Prohibition.

INTRODUCTION

With the repeal of Prohibition in 1933, individual states within the United States enacted various forms of regulation controlling commerce in alcohol. The most common form of regulation is the "Tied House" three-tiered system. This system prevents producers of alcohol selling their products directly to consumers. Rather, they must sell their products to licensed wholesalers, who in turn must sell to licensed retailers, who sell to the consumer. In the early years after Prohibition ended, there was explosive growth in the number of wholesalers, resulting in dynamic competition. In recent decades, however, there has been massive consolidation in this industry and the market is now controlled by and concentrated in relatively few firms. For instance Texas has just two major distributors with statewide distribution.

By contrast, the number of small wineries, often family-owned, has increased dramatically. Individually, the production of these small wineries can be small. The large wholesalers are less interested in marketing such wines because they need large-volume sales in order to remain competitive. To encourage a domestic wine industry, some states enacted legislation allowing wine producers within the state to ship their products directly to consumers within their states.

Small wineries turned to direct sales, not only to consumers within their own states, but also to consumers in other states that lacked their own local wine industry. Such sales were facilitated by yet another economic change: the growth in telecommunications, especially the Internet. Now a wine lover in one state can simply pick up the telephone or use the Internet to purchase wine produced in another state and have it shipped via common carrier. Likewise, retailers in wine-producing states jumped on the bandwagon and shipped wine directly to consumers in other states.

Wholesalers, with a vested interest in the three-tiered system demanded states enforce their laws prohibiting importation of alcohol from other states, including wine, unless it was contracted through licensed wholesalers. The wine industry reacted seeking litigation to overturn the ban on direct shipment to consumers in states prohibiting direct shipment of wine particularly when intra-state wine shipments are allowed (Anderson, 2004; lee, 2005).

Recent lower federal court decisions have cast serious constitutional doubt upon the authority of a state to discriminate in this manner against wine producers and sellers from other states in favor of its own domestic wine industry. The United State Supreme Court ended the era of commerce discrimination in 2005 when it decided that the Twenty-first Amendment, which repealed prohibition, had not "rescinded "the Commerce Clause (Anderson, 2004; Lee, 2005). Instead, the Court embraced a new position. The two constitutional provisions must be read together, in synchronization, rather in opposition to each other. To reconcile the commands of the Twenty-first Amendment and the Commerce Clause, the Court devised a new rule: state laws discriminating against interstate commerce in alcohol are unconstitutional unless they relate to one of the powers set aside for the states by the Twenty-first Amendment.

Although the recent United States Supreme Court ruling has set in motion changes to state laws on direct wine shipments, the shipment of wine directly to consumers is still prohibited in 18 states with such shipments considered a felony in three states. Many "prohibitionist states" forbid consumers from buying wine in other states and shipping it to themselves at home. The problem is seen not as one of protectionism towards abuses of alcohol, but rather towards intra-state commerce based on the legacy of Prohibition. (Wine Institute, 2006).

LITERATURE REVIEW

Constitutional Basis

Government regulation of traffic in intoxicating liquor has long been a problem in American constitutional law. National Prohibition came to an end in 1933 with the adoption of the Twenty-first Amendment, and liquor control and regulation was returned to the states.

The interaction of the Twenty-First Amendment, and its constitutional provisions, essentially affects how courts resolve issues in alcohol direct shipment litigation. Until their 2005 decision, the United States Supreme Court had not precisely defined the Twenty-First Amendment's boundaries (Gobuty, 2004).

1. <u>The Twenty-First Amendment</u>

The Eighteenth Amendment established Prohibition and superseded all previous legislation on alcohol. Public concern over the Eighteenth Amendment started a new movement to end the government's prohibition on alcohol use. As a result, Congress officially enacted the Twenty-First Amendment in 1933 ending prohibition. The text of the amendment follows:

Sec. 1. The Eighteenth Article of amendment to the Constitution of the United States is hereby repealed.

Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress (Gobuty, 2004).

The Twenty-First Amendment gives states a constitutional basis for regulating alcohol distribution by prohibiting the delivery of alcohol, if delivery is in violation of such state's laws. In 1935, Congress enacted the Liquor Law Repeal and Enforcement Act to clarify the text of the Amendment. According to State arguments, the Act conveys powers to them superseding those granted to Congress under the dormant Commerce Clause. On the other hand, courts have noted the Act does not re-convey power to the states. The Supreme Court's interpretation of the Twenty-First Amendment suggests it must be read in conjunction with the Act (Gobuty, 2004; Rickhof & Sykuta, 2005).

According to Gobuty (2004), two additional congressional acts are important to an understating of current alcohol direct shipment laws litigation:

- Congress in 2000 passed the Twenty-First Amendment Enforcement Act. This Act grants state attorneys general the power to sue in federal court for injunctive relief against out-of-state violators of state alcohol regulation.
- Congress enacted in 2002 the Department of Justice Appropriations Authorization Act, which contains a provision authorizing limited direct shipping of wine in certain circumstances. This provision grants exceptions for winery visitors who wish to have wine shipped to their homes, where alcohol direct shipment laws would otherwise prevent such shipments. While the Act currently grants exceptions for some travelers, it does not decisively resolve relevant alcohol direct shipment laws issues.

2. The Dormant Commerce Clause

The Dormant Commerce Clause is a long-standing legal doctrine in U.S. Constitutional law that limits the power of states to establish legislation impacting interstate commerce. According to Green (1940), the basis of the U.S. Constitution is that it reserves for Congress the exclusive power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"; therefore, individual states are excluded from, or at least limited in, their ability to legislate such matters. It is a doctrine inferred by the U.S.

Supreme Court and lower courts from the actual Commerce Clause in the Constitution (Gobuty, 2004).

The Commerce Clause acts as a free-trade agreement among the states. Gobuty (2004) noted that the Supreme Court, in justifying the Dormant Commerce Clause stated, "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation".

Analysis of the dormant Commerce Clause in alcohol direct shipment litigation depends on how Courts' view the interplay with the text of the Twenty-First Amendment. According to Gobuty (2004), courts have generally taken two analytical approaches: a "Broad Standard Rule" or a "Modern Accommodation Standard Rule." The earliest Supreme Court decisions adopted the Broad Standard Rule, suggesting the Twenty-First Amendment authorizes states to exert unrestricted control over alcohol use. More recent Supreme Court opinions have followed the Modern Accommodation Standard Rule, emphasizing the need to harmonize the Twenty-First Amendment with the dormant Commerce Clause (Gobuty, 2004).

The United States Supreme Court has applied both the Broad Standard Rule and Modern Accommodation Standard approaches in recent cases. Yet, the Court's more recent trend has been to follow the Modern Accommodation Standard approach (Gobuty, 2004).

Prohibition and the Grand Assumption

The Failure of Prohibition

The Eighteenth Amendment prohibited only the manufacture, sale and transportation of alcohol. The possession and consumption of alcohol remained legal, and many Americans were eager to obtain it (Anderson, 2004). Others saw a profitable, yet risky business opportunity to serve a willing market by robbing, burglarizing and hijacking established stocks of alcohol (Anderson, 2004). Still others created a bootlegging industry, in which alcohol was smuggled from abroad, mainly Canada, into the United States and sold at great profit. According to Anderson (2004), many people resorted to producing alcohol in their own homes. Alcohol consumption among some sectors of the population actually increased during national Prohibition.

The Twenty-first Amendment

The downfall of Prohibition was inevitable, given the high demand, easy supply and ineffectual enforcement. Prohibitions' fate was certain with the ratification of the Twenty-first Amendment. Section two of that Amendment provided that the import or transportation of alcohol in violation of state law is prohibited, suggesting that it conferred complete and unregulated constitutional authority upon the states to regulate such commerce.

The Grand Assumption

Lee (2005) stated in a recent report that the common understanding of the 21st Amendment is that each state has the absolute power to regulate and control alcoholic beverages in their own boundaries, and that the federal government must take a "hands off" approach when dealing with state control of such products. That is the common understanding, the Grand Assumption and why alcoholic beverage regulation is so varied among the fifty states. For example, a state like New Hampshire exerts total control over the distribution and sale of alcoholic beverages that they are deemed the sole importer, wholesaler, and retailer of alcoholic beverages; in order for its citizens to purchase alcoholic beverages, they must do so through state stores (Anderson, 2004; Lee, 2005). For a state to maintain a monopolistic system is financially rewarding. However, for the states' consumers, who may not find a particular product that is openly available in a neighboring state, the restrictions this imposes can be significant.

Wholesalers of alcoholic beverages generally support the existence of statutes that require all alcoholic beverages be sold through a wholesaler. In many other business, effectively and profitably eliminating the middle distribution level is usually considered good business sense. In the alcoholic beverage industry, it is a criminal offense. Retailers of alcoholic beverages are the only ones authorized to sell alcoholic beverages to consumers in certain states, while some states permit producers in their state to sell product directly to consumers. California, for example, allows wineries to sell wine directly to consumers.

These varying state regulations may be why it is so difficult to implement "silver bullet" legislation that would make direct shipment of wine available in all states to all consumers (Lee, 2005). State laws are being enforced that for any other industry would be found to be an antitrust violation. State statutes are justified, at times, in terms of public safety but also deal with profit and monopolies.

Those leading the case in favor of direct shipment argue that such laws discriminate against out-of-state producers in favor of in-state producers. Until recently, New York State residents could order wine from within the state but not from out of state. According to Lee (2004), reciprocity states allow direct shipment of wine from states that accord the same privilege. These shipments must be to persons of legal age and are only for personal use, not resale.

The beneficiaries of the current distribution system are powerful wholesalers; middle men in the “three-tier” system of producer, distributor, and retail outlet. In many states these wholesalers enjoy a government-imposed monopoly and have a stake in the retention of current restrictions. A study by Riekhof & Sykuta (2005) concludes that “economic interests in both the private and public sectors are the principal drivers of restrictions on direct interstate shipping of wine.”

Wholesalers and retailers are usually the opponents to direct wine shipments and laws that would loosen restrictions. They believe that any infringement on their current monopolies will hurt their businesses. Others believe that by opening the state to limited, regulated (and sometimes even taxed) shipments, wineries can build brands that will result in increased sales for in-state wholesalers and retailers (Lee, 2005).

Interstate Trade Barriers in the Alcohol Beverage Market

Trade barriers between states have become so numerous that many look upon them as insurmountable. According to Gobuty (2004), the extent these barriers obstruct the normal flow of goods in interstate commerce cannot readily be determined. Trade barriers affecting alcoholic beverages should be differentiated from trade barriers established for other goods and services because they are legally protected by the Twenty-first Amendment, which prohibits the transportation or importation into any state of intoxicating liquors, that are in violation of the laws of that state (Green, 1940).

According to Carr (1940) and Green (1940), protection of local grape-growers and their wineries is a primary reason for adopting wine discrimination laws, although in a few cases they may have been to increase tax collections. Only a limited number of states produce enough wine from locally cultivated vineyards to export in large quantities. This factor, along with the disparity in processing costs between small and large wineries, is the important source of legislation that reduces wine trade barriers. The small farmers and wineries fight to preserve their local markets for their own products (Carr, 1940; Green, 1940; Lee, 2005). According to the Association (2003) and Agriculture (2002), California, which out-produces all other states combined, is followed in tonnage yields, by Washington and New York. Yet each of the remaining forty-seven states produce wine. In many of these states, grapes are grown by small farmers who allot a part of their acreage to grape vines, with the intention of fermenting on their own premises for sale in a nearby market.

The U.S. Wine Industry

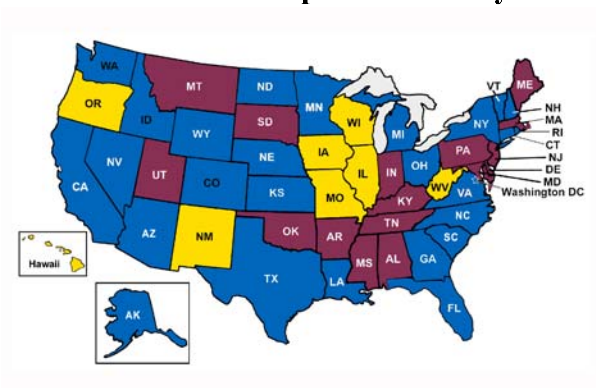
In the past 18 years, 43 states have considered more than 160 bills proposing changes to direct shipment laws. Twenty-three states have adopted some form of direct shipment allowance, ranging from reciprocity regulations to permitting systems to special handling provisions. Three states adopted opposing legislation making the receipt of direct-shipped wine a felony. Legislative battles triggered a series of court cases testing the legality of state-level restrictions on interstate shipping (Riekhof & Sykuta, *2005)*.

Advocates for direct shipping claim such restrictions violate the Commerce Clause of the U.S. Constitution; opponents of direct shipping argue that states have a 21st Amendment right to regulate the distribution of alcohol within their borders.

The three-tier distribution system, adopted by most states following the repeal of prohibition, requires alcoholic beverages to be sold to a state-licensed distributor that in turn sells the product to a state-licensed retailer. Few distributors have licensed operations in all 50 states, so wine producers have to develop relations with several different distributors to gain access to a broad geographic market. Thus, there are high transaction costs for wineries in identifying and negotiating marketing agreements with distributors across several states. Those costs are exacerbated by “franchise laws” in some states that make it difficult, if not impossible, for producers of alcoholic beverages to unilaterally terminate relations with a distributor (Riekhof & Sykuta, *2005).*

As shown on table one, the direct shipment ban is hardly unique. As of February, 2006, 21 states allowed interstate direct shipments of wine under certain conditions, whereas 18 prohibited it, with three of these states classifying direct wine shipments as a felony. Eleven states are classified as “reciprocity” states. Reciprocity guarantees that shipping rights from other reciprocal states are acknowledged (Wine Institute, 2006; Wiseman & ElligHow, 2003).

Table one - Direct Shipment Laws by State for Wineries (as of July 2006)



Limited direct shipping & permit states:
allowance of limited shipments:
Alaska (a reasonable amount)
Arizona (on-site sales only)
California (permit required - taxes paid)
Colorado (permit required - taxes paid)
Connecticut (permit required - taxes paid)
Florida (excise taxes paid/ consumer taxes paid)
Georgia (permit required - taxes paid)
Idaho (permit required - taxes paid)
Kansas (on-site sales only)
Louisiana (permit required - taxes paid)
Michigan (permit required - taxes paid)
Minnesota
Nebraska (permit required - taxes paid)
Nevada (permit required -taxes paid)
New Hampshire (permit required - taxes paid)
New York (permit required - taxes paid)
North Carolina (permit required - taxes paid)
North Dakota (permit required - taxes paid)
Ohio (consumer taxes paid)
Rhode Island (on-site sales only)
South Carolina (permit and report required - taxes paid)
Texas (permit required - taxes paid)
Vermont (permit required - taxes paid)
Virginia (permit and report required - taxes paid)
Washington (permit required -taxes paid)
Washington D.C. (one quart per person)
Wyoming (permit required - taxes paid)

Reciprocity states:
Hawaii (registration - report required)
Illinois
Iowa
Missouri
New Mexico
Oregon (permit required)
Wisconsin (registration - report required)
West Virginia

Direct shipping not permitted:
Alabama
Arkansas
Delaware
Indiana
Kentucky (felony for winery to direct ship)
Maine
Maryland (special interstate by 3-tier only)
Massachusetts
Mississippi
Montana (consumer permit - no carrier)
New Jersey
Oklahoma
Pennsylvania (special interstate by 3-tier only)
South Dakota (special interstate by 3-tier only)
Tennessee (felony for winery to direct ship)
Utah (felony for winery to direct ship)

Recent Litigation and Potential Impacts

According to Anderson (2004), the Commerce Clause expressly confers power upon Congress to regulate interstate commerce. It does not, however, by its terms limit state authority in any particular area of commerce where such authority does not conflict with congressional legislation (Anderson, 2004; Lee, 2005). The United States Supreme Court has consistently adhered to the position that judicial power to limit state commercial authority is essential to protecting the national market by preventing states from engaging in "the evils of 'economic isolation' and 'protectionism (Anderson, 2004).

This evolution of Commerce Clause legal theory reveals that state laws which place out-of-state products at an economic disadvantage, due to their geographical origin, are far more vulnerable to constitutional challenge than evenhanded state laws which encumber interstate commerce. Litigation concerning the direct shipment controversy has yielded judicial decisions in six states.

The following is a summary of these six key cases. Each case argues the nondiscrimination principle of the Commerce Clause with the scope of state power under the Twenty-first Amendment (Anderson, 2004). There is a conflict of opinion, particularly between the Seventh, Eleventh, Fifth, Fourth, and Sixth Circuits, over the question of the proper analytical framework for resolving clashes between the dormant Commerce Clause and the Twenty-first Amendment. These cases helped set the stage for the May 2005 decision by the United States Supreme Court.

A. Indiana (Seventh Circuit)

Indiana law provides that it is unlawful for persons who sell alcoholic beverages in other states to ship such beverages directly to consumers in Indiana, while Indiana sellers may do so. Indiana consumers brought suit, claiming that such differential treatment was unconstitutional. The district court held that this law violated the dormant Commerce Clause, but was reversed by the court of appeals. On March 24, 2006 new direct-to-consumer permit legislation was signed by Governor Daniels. The law, which places strict restrictions on direct shipment, limits the number of cases a winery can ship direct to a consumer with a limit of no more than 3,000 cases into Indiana each year. There is also a 24 case consumer aggregate total annually and the initial purchase must be on-site. Applications and registration information is still in process.

B. Florida (Eleventh Circuit)

Florida law prohibited any person from shipping alcohol from out-of-state directly to consumers, but allowed Florida wineries to do so. The district court followed the analytical framework previously established by the United States Supreme Court. It concluded that this law discriminates against out-of-state wineries and that Florida's legitimate interests can be adequately served by reasonable nondiscriminatory alternatives. This was resolved by requiring out-of-state wineries to collect Florida taxes. Effective February 16, 2006 wineries may legally ship wine to consumers in Florida.

C. Texas (Fifth Circuit)

Texas, like Indiana and Florida, prohibits out-of-state firms from shipping alcohol directly to consumers, while allowing Texas wineries to do so. In litigation challenging the constitutionality of the ban on direct shipment of out-of-state wine, the district court initially held the Texas law violated the Commerce Clause and was not protected by the Twenty-first Amendment because it did not demonstrate a true concern of restraint; but because Indiana's ban was originally upheld, the district court in Texas reconsidered its decision. Direct shipments permitted; with certain restrictions. On August 1, 2005, the Texas Alcohol Beverage Commission issued further clarification regarding the issuance of permits and the rules governing shipments while processing a permit application.

A lawsuit was filed in U.S. District Court on April 3, 2006, challenging the constitutionality of certain provisions of the Alcoholic Beverage Code and seeking an injunction barring their enforcement. The lawsuit claims that sections of the Code discriminate against interstate commerce, and violate the Interstate Commerce Clause, by authorizing in-state wine retailers to ship wine directly to Texas consumers while denying out-of-state wine retailers the same right. The Texas Alcoholic Beverage Commission agreed to a preliminary injunction on May 22, 2006, stating that TABC will not interfere with sales or shipments of wine from out-of-state retailers to Texas consumers. Effective immediately, out-of-state retailers may ship wine to adult Texas consumers without applying for or obtaining a permit from the Texas Alcoholic Beverage Commission (Wine Institute, 2006).

D. North Carolina (Fourth Circuit)

North Carolina prohibits direct shipment to consumers from out-of-state vendors while permitting in-state wineries to do so. In ensuing litigation, the Fourth District court found that North Carolina's law discriminates against out-of-state producers. Rather than applying strict scrutiny to the justifications for this discrimination, the court concluded this was direct discrimination against interstate commerce. The court then applied the established Twenty-first Amendment core analysis and determined that the state had not demonstrated any reason for the favorable treatment afforded in-state wineries and thus concluded that North Carolina's law is unconstitutional requiring the State from enforcing its ban on out-of-state direct shipment.

E. Michigan (Sixth Circuit)

Michigan prohibits out-of-state wineries from shipping directly to consumers in Michigan, but allows Michigan wineries to do so with minimal regulatory oversight. The Sixth Circuit concluded that the discrimination violated the dormant Commerce Clause and that it failed to advance core state powers reserved by the Twenty-first Amendment. The discrimination lay in the facts that Michigan wineries could avoid price mark-ups of wholesalers and retailers whereas out-of-state wineries could not. Michigan appealed to the United States Supreme Court. December 15, 2005 Michigan Governor Granholm signed into law the new direct-to-consumer wine shipping law. The new statute, which takes effect immediately, allows for a winery anywhere in the US that obtains a direct shippers permit from the State of Michigan to ship up to 1,500 cases of wine annually to Michigan consumers.

F. New York

A Federal District court in New York ruled that New York's prohibition against direct shipment from out-of-state alcohol discriminates against interstate commerce because in-state wineries are allowed to do so, but requires all out-of-state wines to pass through New York's three-tier system. Further the court found that the express purpose of allowing instate wineries to ship directly to consumers was to confer an economic benefit on them, which is not a central concern of the Twenty-first Amendment. New York appealed to the United States Supreme Court. On August 5, 2005 direct shipments to consumers in New York state were allowed, with some restrictions.

G. Virginia

A Federal District court concluded Virginia's law is the very definition of a discriminatory law. It also ruled that the State had failed to prove that there are no other nondiscriminatory means of enforcing their legitimate interests. This court sharply criticized the ruling of the Seventh Circuit in the State of Indiana case as improperly decided because it does not rely upon the established dormant Commerce Clause analysis. As a result, the court lifted the ban on direct shipping from out-of-state. This decision was appealed, but a new Virginia law permits out-of-state wineries and retailers to ship directly to consumers in Virginia.

The Recent US Supreme Court Ruling

On May 16, 2005 with a 5 to 4 decision, the United States Supreme Court gave a boost to commerce between wineries and their customers, ruling that states permitting in-state vintners to sell directly to consumers may not deny that right to out-of-state producers. The States put forth three main arguments to justify discriminatory restrictions on out-of-state wineries: preventing the direct sale of alcohol to minors, improving the ability of states to collect sales tax, and alcohol is simply different than other articles of commerce. None of these arguments persuaded the Court.

Ruling that free interstate trade in wine trumps the states' rights to regulate alcohol sales (as argued under the 21st amendment), the court struck down New York and Michigan laws under which wineries from other states had to sell through state-licensed wholesalers, while local wineries could deal with lovers of the grape by phone and Internet. This discrimination was an unconstitutional trade barrier and according to Lane (2005), the ruling could help reshape the nation's fast-growing $22 billion-a-year wine business. It gives consumers in some of the country's largest wine markets the right to buy wine directly from thousands of small producers that previously could not meet the states' conditions.

However, the Court's decision does not authorize direct shipping. In fact, for those States that prohibit all direct shipping, the ruling has no direct affect because such laws treat in-state and out-of-state wineries the same. For those States whose laws do discriminate in one form or another, these states will have to take some legislative or regulatory action to address the discrimination issue and to build a framework for shipments to be made (Lewis & Stoll, 2005).

Table 2 shows how some states have already reacted to the Courts' decision by changing their laws on direct shipment.

Table 2. Current Actions by States Since the Supreme Court Ruling in May 2006
July 1, 2006 – Direct wine shipments allowed. Winery must obtain a license from the state in order to ship wine directly to consumers
May 22, 2006 - The Texas Alcoholic Beverage Commission agreed to a preliminary injunction stating that TABC will not interfere with sales or shipments of wine from out-of-state retailers to Texas consumers.
April 3, 2006: Minnesota Lifts Ban on Internet Wine Sales and Advertisements **April 3, 2006. -** Texas a lawsuit Filed in U.S. District Court –challenging the constitutionality of certain provisions of the Alcoholic Beverage Code and seeking an injunction barring their enforcement.
March 13, 2006: Governors Sign Direct-to-Consumer Shipping Bills in Washington and Idaho
February 16, 2006: Florida Now Open to Direct Wine Shipping
January 1, 2006: FedEx Expands Direct Shipping in Michigan and California and Announces Approved Drop-off Locations for Wine Shipments.
December 15th, 2005: Governor Granholm Signs Michigan Direct Shipment Law
August 31st, 2005: California Governor Signs Direct shipment law regarding reciprocity
August 5th, 2005: New York Issues Complex Direct Shipping Rules
July 20th, 2005: Ohio Opened to Direct Wine Shipping
June 24th, 2005: New York Legislature Approves Direct-to-Consumer Wine Shipping
May 16th, 2005: Supreme Court Rules to End Discrimination Against Out-of-State Wineries by New York and Michigan
Source: Wine Institute Events (2006)

CONSULSION – WHAT'S NEXT

Do state laws dealing with direct wine shipment interfere with interstate commerce? Does a state have a legitimate interest in protecting its citizens from the wide net of overindulgence? States may have an interest in controlling the distribution of alcohol and protecting its citizens from alcoholic abuses; but to imply that a product is legal in the state because it went through state mandated distribution system while the identical product is illegal simply because it was shipped directly to a consumer from a producer in another state raises the question of how a state benefits from these restrictions (Gobuty, 2004; Lee, 2006).

Regardless of any Constitutional basis for overturning alcohol direct shipment laws, public policy should dictate that three-tier distribution systems within states should not hinder out-of-state manufacturers. Gobuty (2004) noted that state distribution systems are not designed to regulate out-of-state shipping. In addition, the application of such distribution systems to out-of-state shippers is patently anticompetitive.

State distribution systems are not undermined by out-of-state shipping. States adopted three-tier distribution systems primarily as a result of tied-house limitations, which states had earlier passed to prevent monopolies in manufacturing, distribution and retail of alcoholic beverages. In part, states intended these systems to prevent manufacturers from exclusively selling their products at manufacturer-run retail shops and dining establishments.

The recent United States Supreme Court ruling does suggest that requiring a physical presence in-state as a condition to direct ship is unconstitutional. This calls into question state laws that require in-state retailers, who buy from wholesalers, to buy from wholesalers located in-state. Costco recently challenged, and won a law suit (2006) against the Washington State Liquor laws, claiming such laws controlled and established prices and were in violation of the Sherman anti-trust laws.

According to Gobuty (2004), from one perspective, the Supreme Court suggests it strongly disfavors state statutes that require in-state business operations. On the other hand, the three-tier system's middle tier is highly dependent on the in-state business requirement, and the Supreme Court went out of its way to declare the three-tier system as "unquestionably legitimate." (Gobuty, 2004).

Also called into question are laws that allow in-state wineries, but not out-of-state wineries, to sell directly to restaurants and other retailer’s located in-state. Such a law currently exists in California, which was repealed in August 2005, could adversely affect many California wineries that rely heavily on local retail direct sales (Gobuty, 2004; Bolt 2006).

While the decision is a clear victory for those in favor of direct shipping, the real impact will only be known once States choose to rewrite their laws to respond to the decision, and how the lower courts apply the decision to future challenges to direct shipment and the three-tier system.

As part of any new legislation, Lewis and Stoll (2005) believe the wholesalers' lobby will work hard to insure states include onerous paperwork, licensing and fee requirements making it as difficult and costly as possible to direct ship. The more challenging the paperwork and licensing requirements and the higher the fees, the less opportunity wineries will have to improve their market position through direct sales.

REFERENCES

Agriculture, U. S. D. o. (2002). Non-citrus Fruits and Nuts 2001 Summary (Vol. No. FrNt 1-3(02)).

Anderson, L.C. (2004).Direct Shipment of Wine, the Commerce Clause and the Twenty-First Amendment: A Call for Legislative Reform. *Akron Law Review*, 37, 1-39.

Association, A. V. (2003). *Annual Report*.

Bolt, K. (2006) Costco Wins Beer, Wine Suit. Judge's ruling could lead to lower prices across state. Seattle P-I Accessed September 10, 2006 **http://seattlepi.nwsource.com/business/267714_costco22.html**

Carr, A.L. (1940). Liquor and the Constitution: Law and Contemporary Problems, Alcoholic Beverage Vol. 7, No. 4,709-716.

Gobuty, L. R. (2004). Milking the Oenophile: The Twenty-First Amendment and State Discriminatory Wine Import Policies. *Business Law Review*. University of California, Davis, School of Law. Posted Monday, January 10, 2005. 5 U.C. Davis Bus. L.J. 1

Green T. S. (1940). Interstate Barriers in the Alcoholic Beverage Field: Law and Contemporary-Problems, Vol. 7, No. 4, *Alcoholic Beverage (*Autumn, 1940), 717-727.

Lane, C. (May 17, 2005) Justices Reject Curbs on Wine Sales 5-4 Ruling a Victory for Interstate Shippers. Washington Post Staff Writer. Page A01

Lee, W (2005). Background on Ant-Direct Shipment Laws. *Wine Institute*. webmater@winelaw.org Accessed March 22, 2006.

Lewis, M. and Stoll, D. (2005) U.S. Supreme Court Rule on Direct Shipment. Acessed September 10, 2006 from http://library.findlaw.com/2005/Jun/10/174717.html

Riekhof, G.M. and Sykuta, *M.E.* (2005) Politics, Economics, and the Regulation of Direct Interstate Shipping in the Wine Industry. *American Journal of Agricultural Economics***.** Volume 87 Issue 2, Page 439 -

Sloane, D. (2002). Summary Statement of the American Vintners Association, presented at Federal Trade Commission Workshop on Possible Anti-Competitive Efforts to Restrict Competition on the Internet (October 8, 2002).

Wine Institute Events. (2006). Current Events. Accessed September 12, 2006. http://www.wineinstitute.org/programs/shipwine/current_events/current_events.htm

Wine Institute. (2006). Background on Direct Shipment, Accessed August 1, 2006. http://www.wineinstitute.org/programs/shipwine/backgrounder/backgrounder.htm#Assumption

Wine Institute Map. (2006). Map of State Shipping Laws. Accessed October 5, 2006. http://wi.shipcompliant.com/Home.aspx

Wiseman, A.E.; ElligHow, J. (March 2003) Many Bottles Make a Case Against Prohibition? Online Wine and Virginia's Direct Shipment Ban. *http://72.14.203.104/search?q=cache:2pjlRqEcUegJ:www.ftc.gov/be/workpapers/wp258.pdf+How+Many+Bottles+Make+a+Case+Against+Prohibition%3F&hl=en&gl=us&ct=clnk&cd= 1*