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Duncan Liquor Law Letter

DUNCAN LIQUOR LAW LETTER

July, 2018

A monthly newsletter for the clients of
R.E. "Tuck" Duncan, Attorney at Law
Please forward as you deem appropriate.
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This information is not to be considered legal advice.
Consult a competent attorney on specific questions.

I cook with wine, sometimes I even add it to the food."
W.C. Fields

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No. 118,165

IN THE COURT OF APPEALS OF THE STATE OF KANSAS
CITY OF LEAWOOD, Appellee,
v.
ROBERT PUCCINELLI, Appellant.

SYLLABUS BY THE COURT
1. Standard field sobriety tests are not searches under the Fourth Amendment to the United States Constitution or Section 15 of the Kansas Constitution Bill of Rights.

2. The voluntariness of consent to a search is a factual question that the district court determines. On appeal, we uphold its finding if it is supported by substantial evidence.

3. In this case, even if field sobriety tests were considered a search under Fourth Amendment standards, the district court's finding that the defendant voluntarily completed them is supported by substantial evidence.

4. While the results of horizontal gaze nystagmus (HGN) tests are not admissible in Kansas courts for any purpose unless a proper foundation for their

scientific validity is made, evidence about the process of testing may be introduced if it is otherwise relevant. Here, the defendant's ability to follow simple instructions was relevant, so the district court did not err in allowing evidence about-but not including the results of-HGN testing.

Appeal from Johnson District Court; THOMAS M. SUTHERLAND, judge. Opinion filed June 22, 2018. Affirmed.

._____.

IN THE SUPREME COURT OF THE STATE OF KANSAS
No. 116,250

STATE OF KANSAS, Appellant,
v.
JESSENIA JIMENEZ, Appellee.

SYLLABUS BY THE COURT

1. A routine traffic stop is a seizure under the Fourth Amendment to the United States Constitution. Usually this encounter begins when the vehicle is pulled over and ends when the law enforcement officer has no further need to control the scene and tells the occupants they are free to leave.

2. Traffic stops cannot be measurably extended beyond the time necessary to process the infraction that prompted the stop unless there is a reasonable suspicion of or probable cause to believe there is other criminal activity, or consent.

3. Beyond simply determining whether to issue a citation, a law enforcement officer's mission in a traffic stop typically includes ordinary inquiries for: (i) checking the driver's license; (ii) determining whether there are outstanding warrants against the driver; and (iii) inspecting the automobile's registration and proof of insurance. The officer may also take negligibly burdensome precautions for officer safety. Information gathering must be limited to the infraction prompting the stop or those matters directly related to traffic code enforcement, i.e., ensuring vehicles on the road are operated safely and responsibly.

4. While a driver is being detained for a routine traffic stop, a law enforcement officer may not conduct questioning unrelated to the officer's mission if it measurably extends the stop-absent probable cause or the reasonable suspicion ordinarily demanded to justify detaining an individual.

5. A law enforcement officer need not disregard information that may lead the officer to suspect other criminal activity during a traffic stop. When the detainee's responses and circumstances lead to suspicions unrelated to the traffic offense, an officer may broaden the inquiry and satisfy those suspicions.

6. Travel plan questioning is not always within a traffic stop's scope. The circumstances will dictate that. To fall within the stop's scope, such questions must have a close connection to the initial infraction under investigation or to roadway safety, i.e., ensuring vehicles on the road are operated safely and responsibly. Otherwise, they may be pursued by law enforcement only at the

same time as the officer is completing the tasks appropriate for processing the initial infraction. Questioning outside the stop's scope may not measurably extend the stop's duration absent reasonable suspicion or probable cause to independently support the added detention.

Review of the judgment of the Court of Appeals in an unpublished opinion filed February 24, 2017. Appeal from Geary District Court; MARITZA SEGARRA, judge. Opinion filed June 22, 2018. Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed and the case remanded.

Son of Granholm Inches Closer

By Marc Sorini on July 2, 2018

Two recent developments reinforce my expectation that the Supreme Court will need to clarify the scope of its 2005 Granholm v. Heald decision within the next few years.

Granholm struck down state restrictions on the interstate sale and shipment of wine by wineries, where the state permitted in-state wineries to engage in such direct-to-consumer sales activities but withheld that privilege from out-of-state wineries. According to that decision, such facially-discriminatory laws are virtually per se unconstitutional under the so-called "dormant" Commerce Clause, and are not saved by the additional power that states have over alcohol sales under the 21st Amendment. The Granholm court also referred to the three-tier system as "unquestionably legitimate."

In the years since Granholm, lower federal courts have wrestled with the question of whether or not the Commerce Clause's non-discrimination principle is limited to state laws imposing different rules on in-state versus out-of-state producers and products. Decisions by several Circuit Courts of Appeal, including the US Court of Appeals for the Second Circuit (Arnold's Wines, 2009) and the Eighth Circuit (Southern Wine, 2013), have concluded that only those state laws discriminating against out-of-state producers or products face the high level of scrutiny mandated by Granholm. Others, including the Fifth Circuit (Cooper II, 2016) and the Sixth Circuit (Byrd, 2018), have concluded that state laws regulating the wholesale- and retail-tiers remain subject to vigorous Commerce Clause scrutiny. Notably, however, the Fifth and Sixth Circuit opinions also suggest that the outcome of a challenge to a state law regulating the wholesale- or retail-tier may depend on the type of law challenged, and both involved residency requirements for licensees, not laws directly regulating the sale and shipment of alcohol.

Developments in the past month add incremental pressure on the federal judiciary to provide clarity on these issues.

First, on June 14, 2018 Orion Wine Imports filed a complaint alleging that the California laws prohibiting out-of-state wine importers and wholesalers from selling directly to California retailers violate the dormant Commerce Clause, as in-state importers and wholesalers can (of course) make such sales. (As in most Commerce Clause cases, the complaint also includes a count arising under the Privileges and Immunities Clause, but such claims almost invariably rise or fall with the outcome of the Commerce Clause claim.) Among the counsel for Orion

Wine Imports are Robert Epstein and James Tanford, two Indiana-based attorneys who have been at the forefront of direct wine shipping litigation for almost two decades. Notably, California falls within the Ninth Circuit, and that court has yet to issue an opinion taking a position on the application of Granholm to laws regulating the wholesale- or retail-tiers.

Second, on June 15 the US District Court for the Eastern District of Missouri handed down an opinion in Sarasota Wine Market v. Parson, E.D. Mo. No. 4:17CV2792 HEA. The opinion grants the state defendants' motion to dismiss a case brought by a Florida wine retailer and a Missouri resident seeking to purchase wine from out-of-state retailers. Because Missouri sits within the Eighth Circuit, it was not surprising at all that the district court found the plaintiffs' claims under the Commerce Clause and Privileges and Immunities Clause foreclosed by the Eighth Circuit's 2013 decision in Southern Wine and Spirits v. Division of Alc. & Tobacco Control. Much more surprising was the district court's conclusion that the plaintiffs lacked standing to sue. An appeal seems likely.

With another post-Granholm case filed and another case decided and likely headed to an appeal, these developments add incrementally to the pressure for the US Supreme Court to hear a case involving the application of the dormant Commerce Clause to a state alcohol beverage law regulating the wholesale- or retail-tier. Which particular case and particular issue eventually becomes the subject of Supreme Court review is anyone's guess. But the stakes are high for both sides: A limitation of the non-discrimination principles arising from the Commerce Clause to state alcohol laws regulating only producers or products would remove an important tool that various plaintiffs have used to challenge the alcohol market's status quo in the past decade. Conversely, the broad application of non-discrimination principles to state alcohol laws regulating wholesale and retail sales would forcefully push the United States towards a single national alcohol beverage market.

It remains possible that the Supreme Court does not address these questions for decades. But the existing circuit split and escalating litigation activity illustrated by last month's developments all point to a Granholm sequel at the Supreme Court-what I call the "Son of Granholm"-sooner rather than later.

Wine Institute

DIRECT-TO-CONSUMER SHIPPING

Impact of U.S. Supreme Court's Sales Tax Ruling on DTC Wine Shipping

On June 21, 2018 the U.S. Supreme Court ruled in *Wayfair v. South Dakota* that states may require online retailers to collect and remit sales taxes even if those retailers do not have a physical presence in that state. This ruling marks a victory for states, which can now tax remote sellers. Each state will now review its own laws and determine what steps to take to capture sales tax revenues on remote sales.

Wine Institute believes this change will have a limited impact on wineries making DTC shipments. Most states (including the plaintiff state South Dakota) are already

collecting sales taxes on wines shipped to their consumers. Sales tax payment is a provision of most of the DTC shipping laws that have been implemented over the past 30 years, and wineries have already learned how to comply with such requirements.

Currently only a handful of states (Alaska, Colorado, Florida, Iowa, Minnesota, Missouri and the District of Columbia) don't collect state sales taxes from licensed DTC wine shippers, although all of these states, except for Alaska, Minnesota and Washington, D.C., do collect excise taxes. States such as Massachusetts, Montana, New Hampshire, Oregon, Rhode Island and Wyoming currently impose no sales taxes on alcohol, so in those states only the excise taxes and/or state markups are required under their DTC statutes. Wine Institute is monitoring all states for any legal changes requiring out-of-state wineries to remit sales taxes and will keep members informed.

JUN 19 TESLA PUTS HEAT ON 3 TIER SYSTEM

Did you know that auto dealership franchise laws actually are similar to beer distributorship franchise laws in many states? Auto franchise laws in six states -- Arizona, Michigan, Texas, Connecticut, Utah and West Virginia -- don't allow auto manufacturers to sell directly to the public. Other states have passed laws recently to require dealers as well.

Why is this important? Because Tesla, the electric car startup by PayPal founder Elon Musk, has been fighting auto franchise laws in order to sell cars direct.

Tesla doesn't have independent dealers and instead sells through its own stores and through the Internet. Tesla has been waging state-by-state battles with dealer associations to attempt to dismantle franchise laws, to little effect so far.

BUT, it has been revealed that Tesla sometimes makes comparisons of auto dealership "protections" to the three-tier alcohol beverage system as a way to conflate the two, when clearly a car and an alcoholic beverage are two very different consumer purchases. One is a car that a 16 year old can buy and operate, the other is a substance that only those over 21 can consume and under many regulations.

We conjectured at the time that the Tesla issue would somehow connect with bev-alc three-tier last year, and it has already apparently happened.

TEXAS FALLS FOR TESLA. At the Texas Republican Party state convention in San Antonio, where your editor was a spy, under a gun metal sky with eyeglass

fogging humidity -- which may have altered their mental states -- they placed into the state Republican party platform, that:

"The Three-Tier Alcohol System: We urge the Texas Legislature to adopt legislation eliminating the mandatory three-tier system of alcohol production, distribution, and retail. Texans should have the freedom to purchase alcohol directly from manufacturers, just as any other retail product."

Whaaa? Apparently this resolution was presented after a presentation by Tesla about the evils of tiers and a greenhorn legislature conflated cars with alcohol beverages, which of course are very different in nature and consumption.

The "far right's blind dedication to free trade at no expense is mind-boggling," said one insider Texas observer. The rhetoric around deregulation continues to be a hot topic. Another state exec, Rick Donley of the Beer Alliance of Texas, a distributors association, said, "We are continuing to try and find more information about this resolution."

Luckily, nobody, not the least of which politicians, take much truck out of what is in a Party Platform that nobody reads. So take it with a grain of salt.

Latest Stage in Missouri Tied House First Amendment Litigation Could Change Economics of Industry Advertising

By Arthur J. DeCelle on July 10, 2018

The latest development in a lengthy legal challenge to advertising restrictions in Missouri's tied house laws and regulations raises practical economic issues for the alcohol beverage industry and significant legal and policy issues for legislators and regulators at all levels of government. On June 28, Judge Douglas Harpool of the US District Court for the Western District of Missouri filed a decision in Missouri Broadcasters Association vs. Dorothy Taylor. The Missouri Broadcasters Association (MBA) is a trade association representing media outlets. Two licensed Missouri retailers were also plaintiffs in the lawsuit. Ms. Dorothy Taylor is the Supervisor of the Missouri Division of Alcohol and Tobacco Control (DATC).

The basic issue in the case is whether several Missouri alcohol beverage advertising restrictions violate the plaintiffs' commercial speech rights protected by the First Amendment to the US Constitution.

The June District Court decision follows a bench trial held in February 2018. The trial occurred as the result of prior legal proceedings culminating in a 2017 decision by the US Court of Appeals for the Eighth Circuit, which found that the MBA's amended complaint "plausibly demonstrates that the challenged provisions [of Missouri's tied house law] do not directly advance the government's asserted substantial interest, are more extensive than necessary and unconstitutionally compel speech and association."

Perhaps the most important Missouri law challenged in this litigation is an exception in the tied house laws that authorizes a manufacturer to pay for advertising that lists "two or more affiliated retail businesses selling its products" subject to four conditions:

(a) The advertisement shall not contain the retail price of the product;

(b) The listing of the retail businesses shall be the only reference to such retail businesses in the advertisement;
(c) The listing of the retail businesses shall be relatively inconspicuous in relation to the advertisement as a whole; and
(d) The advertisement shall not refer only to one retail business or only to a retail business controlled directly or indirectly by the same retail business.

This language may be familiar to many practitioners and regulators as a nearly identical provision appears in the Federal Alcohol and Tobacco Tax and Trade Bureau (TTB) tied house regulations. Laws and regulations of several states include similar express exceptions and TTB regulations are incorporated by reference in the trade practices regulations of other states. Innumerable TTB and state tied house laws and regulations restrict advertising in similar ways and may be invalidated if the analysis in Missouri Broadcasters is applied by other courts and ultimately upheld by federal appellate courts.
Other Missouri laws and regulations that were successfully challenged by MBA in the trial court prohibit (a) media advertising of price discounts, (b) beer and wine coupons, (c) outdoor advertising of discounts by retailers and (d) below cost advertising.
Unlike many cases based solely on theoretical legal arguments and the text of laws and regulations, the trial in the Missouri case resulted in a wide-ranging inquiry that included expert witnesses on advertising and the level of effort invested by the Missouri DATC in enforcing the challenged laws and regulations. The court's decision suggests that the state struggled to provide any credible evidence that the challenged laws "directly reduce[] overconsumption of alcohol and underage drinking."

The court found that the plaintiffs' expert testimony provided substantial evidence "that there is in fact no demonstrative relationship between media advertising of alcohol and overall consumption rates of underage drinking...The State failed to present any evidence contradicting the testimony, empirical studies, and statistical analysis relied on by the Plaintiffs' expert."
The court agreed with the plaintiffs and cited language from the 8th Circuit decision that "the multiple inconsistencies within the regulations poke obvious holes in any potential advancement" of the state's interest, "to the point the regulations do not advance the interest at all." This finding is a threat to dozens of federal and state alcohol beverage laws that are riddled with exceptions that allow alcohol beverage advertising in one context and expressly prohibit the same advertising in another context (e.g., prohibiting exterior signs and permitting indoor signs).
Because the challenged Missouri laws restrict commercial speech rights protected by the First Amendment, the court also awarded legal fees to MBA and the retailer plaintiffs.

Advertising can be removed from the "marble cake" of state and federal tied house restrictions without dire consequences for regulators. If the reasoning in Missouri Broadcasters survives, the most significant effects will occur in intra-industry negotiations where parties will determine how advertising costs and activities are apportioned across the three-tier system.
Before proclaiming the death of the three-tier system, hundreds of state licensing and tied house laws have nothing to do with advertising. Prohibitions on ownership interests in more than one tier of the alcohol beverage industry are not affected by the recent decision along with substantial restrictions on industry trade practices other than advertising.

Finally, the reasoning in Missouri Broadcasters may have to survive another appeal and must be adopted by other courts to broadly affect house restrictions on advertising throughout the United States. Perhaps a state (or more likely a state with support from interested industry members) will develop credible evidence to support similar laws in other jurisdictions. For example, California aggressively defended analogous laws and regulations, which were ultimately upheld last year by the Ninth Circuit Court of Appeals.

OFFERS IN COMPROMISE ACCEPTED

Titles 26 and 27 of the United States Code contain provisions for the compromise of certain civil and criminal cases. In this context, a compromise is an agreement made between the Government and an alleged violator in lieu of civil proceedings or criminal prosecution.

TTB generally considers offers in compromise for any violation of the laws and regulations it administers, and TTB will provide appropriate assistance to any person or business that wishes to make an Offer in Compromise.

Shown below are the most recent Abstract and Statement forms summarizing the Offers in Compromise accepted by TTB:

- 06/08/2018 - Aberdeen Energy, LLC, Mina, SD
- 06/06/2018 - Sea Gear Marine Supply Inc., Cape May, NJ
- 06/06/2018 - CS&V Inc. (City Smokes and Vapor), Henderson, NV
- 06/04/2018 - MGPI of Indiana LLC, Lawrenceburg, IN
- 06/04/2018 - MGPI Processing Inc., Atchison, KS
- 05/25/2018 - Cigar City Brewing LLC, Tampa, FL
- 05/25/2018 - Verbatim, LLC, Stamford, CT

Court: New Orleans alcohol tax is legal

By: The Associated Press June 28, 2018

Louisiana's Supreme Court has upheld a tax imposed by the city of New Orleans on dealers of alcoholic beverages.

Wednesday's ruling reverses a lower court ruling in what had been a victory for a liquor-industry lobbying group and the Louisiana Restaurant Association. They had argued that the city exceeded its authority by imposing alcohol taxes in excess of what was allowed by state law.

But the high court agreed with the city that the tax is structured as an occupational license tax on dealers and is legal. It wasn't immediately clear how much revenue the tax would bring in. City officials and the lobbying organizations didn't immediately return requests for comment.

The tax is applied per-gallon at various rates on different types of alcoholic beverages.

Cigar Aficionado: D.C. Judge Delays FDA Warnings

In a decision that has significant implications for the many beverage alcohol retailers who also sell cigars, a Washington D.C. judge issued an injunction yesterday postponing the looming effective date for the FDA's onerous warning label scheme for cigar packaging and advertisements-marking a huge victory for the cigar industry. While the order does not outright ban the new warning label requirements, which were scheduled to go into effect on August 10, it should delay their implementation for at least a year, if not longer. Cigar Aficionado has the full story.

June 18 Miller Coors Pabst

There are a lot of moving parts when considering how the possibly epic showdown in court between Pabst Brewing Co. and MillerCoors will unfold.

DOES PABST NEEDS MILLERCOORS? In one word: kinda. Pabst presumably needs the production capabilities and capacity of MillerCoors' wide brewery network, and changing networks would at the very least be chaotic and difficult.

DOES MILLERCOORS NEED PABST? In one word: maybe. For MillerCoors, while it's nice to have Pabst's extra production today, with the amount of total volume both breweries are losing, it may make more sense for MC to close another brewery (Irwindale?) and jettison Pabst's brands, particularly as MillerCoors' own competing lower priced brands are growing.

And then there are their collective distributors, which are mostly shared, who are caught in the middle.

The answer will be decided in an epic lawsuit Pabst has filed against MillerCoors, and the stakes are high ($500 million).

THE BACKGROUND. As you'll remember, Pabst Brewing Co. and MillerCoors are heading to court after negotiations failed to produce a deal to move forward with their contract brewing agreement, in what could be an titanic and fierce fight for Pabst to retain its current production capabilities at MillerCoors' breweries.

MillerCoors of course brews almost all of Pabst's brands under contract under an agreement which expires in 2020, but it has options to renew, says CNBC. For its part, MillerCoors has said it may not have the brewing capacity to keep brewing for Pabst, despite declining sales. At issue here is not necessarily overall volume, but switchovers for so many SKUs. Recall that MillerCoors closed its Eden, NC brewery two years ago.

HIGH STAKES FOR PABST. Finding a replacement system of breweries for Pabst would presumably be difficult. Pabst is accusing MillerCoors of breach of contract, breach of anti-competition laws, fraud and misrepresentation in a $500 million lawsuit. MillerCoors says, nope, it has the right to determine whether it has the brewing capacity to renew the contract.

MILLERCOORS BUYING TIME. IRWINDALE CLOSURE? As we previously reported, MillerCoors has argued its contract with Pabst is "an arms length

agreement which allows the parties to look for their own best interest," according to the judge's April ruling. For it's part, Pabst basically suggests MillerCoors is acting in bad faith because ending the contract brewing relationship would help MillerCoors' competing brands, like hot Hamm's.

FRAUD, ANTITRUST? "There is also evidence that MillerCoors may have also used information relating to the business effects on Pabst of terminating the Brewing Agreement, information which would be improper as it doesn't relate to a sufficient capacity determination," the judge wrote. MillerCoors believes those claims are false.

MC NOT PLANNING TO CLOSE BREWERY. Amid all this, MillerCoors is also reportedly considering closing their Irwindale, CA brewery to save costs, which would further constrain capacity.

But a MillerCoors spokesperson told CNBC, "We routinely evaluate our brewery footprint, our capacity and our efficiency as a matter of smart business. We are not planning to close Irwindale or any other brewery at this time."

FINAL NOTE. While it would no doubt be a technical nightmore for Pabst to move production to other breweries, there's no shortage of brewing capacity out there. With each passing day, more capacity comes online. The question is what kind of *packaging* capacity is out there for Pabst's many, many SKUs?

TTB ACCEPTS $15,000 OFFER IN COMPROMISE from Connecticut-based Verbatim LLC for allegedly operating as a wine wholesaler between October 2011 and June 2014 without a wholesaler permit.

Supreme Court Confirms Online Wine Tax
The Supreme Court decision means all online wine sales will be subject to tax. A legal tax loophole on out-of-state wine purchases has been closed, Liza B. Zimmerman reports.
Posted Wednesday, 27-Jun-2018

Wine sales have been somewhat of a laissez-faire business in the US for some decades - some retailers charged taxes on out-of-state purchases while others elected not to do so. As a result, the same bottle of wine might cost a New York consumer less online in New Jersey than at the shop down the street.
However all of that has changed as last week with the Supreme Court case of South Dakota v Wayfair Inc. In keeping with the justices' ruling, the wine retail market is going to be revamped and standardized in terms of taxes across the country. This telling case - which comes just nine months on the heels of wholesaler pressure pushing UPS and FedEx wine deliveries out of 36 states - will mandate a retail market in which taxes will be paid by retailers large and small.
Most major internet wine sales entities, such as Amazon and Wine.com, have been charging their out-of-state customers taxes all along. Until six months ago, Amazon didn't charge sales tax on sales in areas where it didn't have a brick-and-

mortar presence, says Eric F. Citron, counsel of record for South Dakota in the recent Supreme Court case and a partner in the Maryland law firm Goldstein & Russell, P.C. They changed that policy six months ago, he notes. Amazon did not respond in time to comment for this story.

"We don't expect any significant effects to Wine.com because we've already been collecting and remitting sales tax in nearly every state for many years," shares Rich Bergsund, Wine.com's CEO.

Brave new world but no surprise

While it will likely take a while to implement these new regulations, the wine market is going to drastically change as a result of this case. "After this decision if you have been managing to get your wine out-of-state and tax free that is going to be a lot less likely," shares Citron. He adds that the register price is going to go up as a result. The decision amounts to "a uniform price increase", adds Christian Miller, the proprietor of the Berkeley-based Full Glass Research wine analyst firm.

The new taxes will be "paid in the state of purchase rather than the state of delivery", explains John Hinman, a partner at the San Francisco law firm of Hinman & Carmichael LLP. And it also looks like the roll-out process will be complicated. "It looks like each state will have to pass their own laws," says Danielle Westfall, the CEO and founder of the Sonoma-based internet wine sales site InVino.

The outcome is "going to hurt a few retailers who are shipping across state lines and operating in a grey market", says according to the Napa-based Jon Moramarco, a partner in number-crunching firm of Gomberg & Fredrikson.

No one close to the case said the decision was a shock. "All nine justices agreed that the existing rule was dumb and should be changed," says Citron. Westfall seconds that she is actually shocked it didn't happen years ago.

Other retailers, who have been following the case, acknowledge that something like this was likely to have happened sooner rather than later. "Some merchants have been proactive in charging sales tax on all purchases recently," shares Daniel Posner, owner of the White Plains, New York-based wine shop Grapes The Wine Company and president of the National Association of Wine Retailers (NAWR).

"With their action, they overturned the previous standard that had been determined in the 1992 Quill v North Dakota case, giving states a victory in their years-long effort to gain taxing authority over remote sellers. States must now review their laws to determine what steps they may wish to take to capture sales tax revenues on such remote sales," shares Steve Gross, the vice president of state relations at the Wine Institute.

The huge expansion on the online market "meant that this day was destined to come", adds Robert Tobiassen, a Virginia-based attorney who consults on regulatory issues.

Experts believe most people either won't care or will accept the new sales tax.

The fallout

Out-of-state purchases serve a number of needs. Many believe that most are driven by the hunt for unusual wines. These purchases are more likely to be convenience, says attorney Elke A. Hofmann, the owner of the eponymous New York law firm.

Michael Newman, a partner in San Francisco law firm of Holland & Knight LLP, agrees that out-of-state purchases are usually sought-after items. "I think it's usually a matter of product availability rather than price."

"Most consumers buy wine online because the three-tier system has let them down and the products they want often aren't sold in their states," agrees Westfall. Hoffman adds that, as a result, New York consumers may be upset.

"Saving 8.875 percent on sales tax, especially for large ticket items, makes a difference."

On the other hand, many consumers may not even have been aware that they weren't paying taxes. "Most consumers will initially notice it, gripe about it and then forget about it," according to Tobiassen.

The transition should be fairly smooth for bigger buyers. "The large online retailers have the resources and technical staff to develop the software to calculate and impose these sales ... [while] smaller online retailers will face a greater resource demand in order to comply. Perhaps, many of the smaller online retailers will try to link up with a major online retailer and pay that retailer to calculate and process these sales taxes," shares Tobiassen. Many are already collecting taxes, says Westfall, so "this is likely to be another advantage for the big guys".

Once implemented, the taxes are likely to be minor in terms of their additional cost. "For average priced wines, the sales tax is not going to make or break a consumer's purchasing decision," Tobiassen says.

Lower prices may never have been that important to the direct-to-consumer (DtC) market anyway. "It seems unlikely that lower prices were a major driver of DtC sales from out-of-state suppliers," says data analyst Miller. He adds that evidence of this can be seen by the fact that average prices per bottle sold DtC by wineries and in virtual retailers like Wine.com is far higher than the average off-premise retail price. This is probably because of the shipping costs, he concludes. "I would be surprised to see a significant negative impact on DtC sales from the court decision."

What lies ahead

As retailers have already been restricted from shipping into 36 states since last October, the big changes to purchases and tax increases are going to take place in the other 14 states and the District of Columbia, where registered carriers can ship wine.

Between how long it will take to enforce the payments and how many retailers already were applying them, some think the new policy will hardly make a ripple. "The majority of state DtC laws already required the collection of both sales and excise taxes so the new ruling will have little impact," says Gross. "We will closely monitor those states where such taxes are not already required for any changes, and will keep members apprised of potential new tax obligations."

"Consumers, especially within wine, will reevaluate the relationships they have with their in-state retailers. However, I don't think this will slow down collectors whose goals are primarily focused on top bottles as opposed to top deals," says Chris Leon, the owner and wine director of the one-location, Brooklyn shop

"The real winners here are the State treasuries, because the aggregate amount of sales taxes that will be collected online will potentially be enormous," concludes Tobiassen.

After all there is price to be paid for everything. Tobiassen notes: "In the middle of the last century, judge Learned Hand wrote in a decision that 'Taxes are the price we pay for a civilized society.'"

McLane Drops TX Tied-House Suit

Source: Wine & Spirits Daily

June 6, 2018

In an unexpected turn of events, Berkshire Hathaway's food distribution subsidiary McLane Company has withdrawn its challenge to Texas' tied house laws.

BACKGROUND. McLane has been angling to get an alcohol distributor license in Texas for years. It applied for one in 2011 but then pulled the application, later claiming the TABC gave it the impression that its ownership structure was a problem because Berkshire Hathaway also owns share in the retail tier. Note, this wasn't a formal denial and Texas Alcoholic Beverage Commission (TABC) disagrees with that account.

[Sidebar: Texas' One Share Rule purportedly states that a single overlapping share of stock ownership between tiers, whether direct or indirect, is in violation of the state's tied-house laws. Note, TABC claims this rule doesn't exist, but having read the beverage code, McLane's interpretation seems reasonable.]

McLane did not take kindly to this set of circumstances.

A THORN IN TABC' SIDE. The distributor subsequently inundated the TABC with information requests to see if anyone was receiving special privilege. Just check out this excerpt from a September 2017 Austin American-Statesman report:

"We are talking this side of a million sheets of paper," TABC general counsel Emily Helm said in 2017. Likely because McLane requests included all communications between the agency and the Legislature "since the beginning of time."

Then the distributor joined forces with the Texas Association of Business (TAB) to file a federal lawsuit against the TABC in an attempt to eliminate the One Share Rule [see WSD 06-27-2016]. But the case never made much progress.

So McLane tried another tactic.

In November 2016, the company formally protested the renewal of Core-Mark Midcontinent's liquor license in Texas because Core-Mark, one of the largest distributors of consumer goods in North America, is owned by institutional investors such as Vanguard and T. Rowe Price, which also own share in international alcohol retailers and suppliers like Nordstrom and Molson Coors.

But the TABC renewed Core-Mark's license anyway [see WSD 03-29-2018]. TABC's logic was that the strict regulations on mutual funds like T. Rowe Price "mitigate any risk of tied-house issues." The TABC suggests that tied-house laws are confined to relationships between industry businesses, "not external ownership by non-industry entities," and institutional investors do not 'deal with' a retailer or a consumer in the same way that a bev alc supplier would deal with a retailer.

WHEN LAST WE LEFT OFF two months ago, McLane attorney Brett Charhon, a managing partner at Charhon Callahan Robson & Garza, was not optimistic that the TABC would grant McLane a license to distribute in light of the agency's decision on Core-Mark. He said McLane would be exploring whether the TABC has the authority to "silence Texas citizens from raising concerns about TABC's conduct."

Meanwhile, TABC spokesman Chris Porter told WSD: "Until an application is received, the agency can't determine whether it would be approved or denied."

The question is will McLane apply again? You'll recall, TABC has an entirely new set of leadership since the last time they applied [see WSD 03-14-2018]. But Berkshire Hathaway also acquired a majority stake in Pilot Flying J truck stops late last year, which likely complicates matters further.

We were unable to get an update from McLane by press time, but stay tuned.

The Trademark Trial and Appeal Board Finds There is "Something More" Sufficient to Show That Restaurant Services are Related to Alcoholic Beverages

Source: JDSupra

by: Norris McLaughlin & Marcus, P.A.

June 4, 2018

In In re Honeyhole Sandwiches Inc., Serial No. 87138294, the Trademark Trial and Appeal Board ("TTAB") agreed with the Examiner in refusing the registration of HONEYHOLE SANDWICHES because it was confusingly similar to HONEY HOLE under Section 2(d) of the Trademark Act. In this decision, a strong mark, a menu, and the private labeling trend proves to be "something more" to show that alcoholic beverages and restaurant services are related. This decision is also consistent with the trend in the Trademark Office when examining applications for food, alcoholic beverages, and restaurants in finding that seemingly unrelated goods are related, e.g. alcoholic beverages and cigars; or beers, on the one hand, and vodka on the other.

The Applicant sought registration of HONEYHOLE SANDWICHES for "restaurant with bar specializing in serving proprietary unique sandwiches, local beers and alcohol in a vibrant, eclectic environment" in Class 43. The examiner refused registration, citing the registration for the mark HONEY HOLE for "alcoholic beverages except beers" in Class 33.

In evaluating the du Pont factors, which the TTAB considers in determining a likelihood of confusion, the TTAB unsurprisingly found that the dominant part of Applicant's mark "HONEYHOLE" was similar in sight, sound, and meaning to Registrant's "HONEY HOLE" mark.

More notably, in looking at the similarities between the goods and services, the TTAB found that the Examiner met the "something more" requirement to show a relatedness of the goods and services. The Federal Circuit requires that "[t]o establish a likelihood of confusion a party must show something more than that similar or even identical marks are used for food products and for restaurant services." Under this requirement, simply because a restaurant offers certain beverages does not mean that the food or beverage is related to the restaurant services.

To determine whether there is "something more" rendering the food or beverage related to restaurant services, the TTAB will examine evidence of a specific commercial relationship between the food or beverage and restaurant services and evaluate whether consumers would be likely to believe that an association exists between the food or beverage items and the restaurant services. The requirement may also be met when the registrant's mark is a strong mark.

Here, the TTAB noted that HONEY HOLE was a strong mark and that Applicant's application specifically included "serving .alcohol." The TTAB also found that the Applicant's specimen supported a finding of relatedness. The specimen identified "HONEYHOLE COCKTAILS!" as part of the menu which was used just below the HONEYHOLE SANDWICHES mark.

The TTAB also examined evidence of third-party registrations of the same mark for alcoholic beverage and restaurant services. While the TTAB noted that third-party registrations alone are insufficient to show the requisite "something more," the Examiner also submitted evidence showing that restaurants offer private-label alcoholic beverages under the same mark for their restaurant services, as well as news articles about the trend in restaurants to offer private label alcoholic beverages. The Examiner submitted evidence of online advertising by companies offering to create private label beverage lines for restaurants. Based on this additional evidence, the TTAB found that there was probative evidence establishing that alcoholic beverages and restaurant services are similar.

Relatedly, the TTAB found that the trade and distribution channels for Registrant's alcoholic beverages included restaurants, and that Applicant sold alcohol at its restaurants. There was no evidence of any restrictions on distribution or that the consumers were anyone other than the general public. Accordingly, the TTAB found that the trade channels and classes of consumers were similar.

This decision highlights the interesting impact that the growth in the private label alcoholic beverage has on trademark owners seeking registration. The more expansive the private label trend gets, the more related other goods and services become. For trademark owners of alcoholic beverages, this only gives further reason to do your due diligence in the beginning before investing time and financial resources in building your brand. A trademark clearance search will provide trademark owners a better understanding of potentially related goods and services that could bar federal trademark registration.

June 4, 2018

WSJ Highlights the Own-Premise Battle

Dear Client:

As I write this, I am about to land in Beer City, USA. (With apologies to Grand Rapids and Portland, I'm referring to Asheville, NC). And I drop in amid a nasty fight in North Carolina between brewers, distributors, and retailers involving a brewer's ability to self-distribute beyond the 25k barrel cap.

While that litigation is ongoing, as you know in other states the focus has shifted from franchise law and self-distribution to the ability of brewers to sell directly to the public via taprooms, and increasingly the ability to sell beer-to-go, which essentially makes these brewers competitors to off-premise retailers as well.

The Wall Street Journal is even onto this trend, fronting a piece on Saturday, saying "Small brewers are squaring off against distributors and bar owners in a fight for drinkers as craft beer's once-explosive growth cools."

The highlights:

-Craft-beer volumes grew just 1.6% last year -- slowest growth in at least 10 years.

-All growth is driven through taprooms and brewpubs, which grew 24.2%-accounting for one in 12 craft beers sold-while the remainder of craft-beer sales declined, according to the Beer Institute. Though we'd like to point out that there is evidence against this statistic [see BBD o5-14-2018].

-Roughly 9% of bar traffic across the U.S. now moves through brewery taprooms and brewpubs, according to data from MillerCoors. In Denver and San Diego, the figure is 35%.

-Flying Saucer closed its Austin location after 10 years after sales dropped 20% after a Texas law allowed for tap room exemptions.

-Total on-premise traffic fell 3.6% in 2017, according to data analyzed by MillerCoors. Even more troublesome: In five major U.S. cities (Denver, San Diego, Seattle, Phoenix and Detroit), about 80% of drinkers did not visit a bar following a trip to a tasting room.

-In cities such as Indianapolis, Minneapolis, Seattle and Portland, more than 20% of bar traffic now flows through taprooms. In Denver and San Diego, the figure is as high as 35%.

THE OWN-PREMISE BATTLE. These stats underly a battle royale brewing in North Carolina and many other states over how much is too much tied-house? (For you greenhorns out there, tied-house refers to an alcohol-producer -- brewer, winery, or refinery -- which also serves as a retailer).

Recall that in Europe and Latin America, tied-house policies eventually lead to duopolies which thwarted the craft beer scenes there until recently. Also recall that tied-house abuses eventually lead to prohibition -- because when the bloom comes off the rose, as it always does, nobody can sell beer more cheaply directly to the public than those who make it.

There's also the issue of excise taxation checks and balances. Under three tier, an auditor can check the invoices of brewers, their distributors, and their retailers to make sure they all match. Under tied-house, it's basically the honor system.

And what about ABC stings? It's much easier to revoke the license of an indie c-store over underage sales or other infractions than a full fledged brewery employing dozens if not hundreds of people.

On the other hand, many if not most of these breweries would not be able to get off the ground were it not for the taproom and self-distribution carve outs. It's a balancing act that's sure to create more tension in the months and years to come.

Boston Beer Co. pays New York nearly $1 million over labeling violation
Source: Boston Globe
By Dan Adams
MAY 31, 2018
Boston Beer Co., the maker of Sam Adams and other popular alcohol brands, has agreed to pay New York nearly $1 million to settle charges that it failed to register its product labels with the state, officials said Thursday.
The New York State Liquor Authority, or SLA, said it notified Boston Beer in February 2016 that its distribution subsidiary in the state had received a required label approval for just one product, Summer Blueberry Twisted Tea. Alcohol makers or their distributors are typically required to have the labels of their products approved by local authorities, to help track sales or recalls, and to keep counterfeits or knockoffs from the market.
The SLA said the company promised to remedy the problems, but did not, prompting an investigation that found Boston Beer had sold 1.4 million cases of beverages, including Angry Orchard and Sam Adams products, in New York without submitting its labels for approval.
"It was a little bit odd to us," SLA spokesman Bill Crowley said. "They said they were working on it and we just never heard back from them."
The company has agreed to pay $975,000 to settle the case, the SLA said.
In a statement, Boston Beer said it discovered a "clerical" error resulted in the company failing to register some products with the SLA and said it worked with

the agency to "renew the lapsed registrations and were recently made aware of the final settlement."

Trump says he is likely to support ending blanket federal ban on marijuana

Source: http://www.latimes.com/
By EVAN HALPER
JUN 08, 2018

President Trump said he likely will support a congressional effort to end the federal ban on marijuana, a major step that would reshape the pot industry and end the threat of a Justice Department crackdown.

Trump's remarks put him sharply at odds with Atty. Gen. Jeff Sessions on the issue. The bill in question, pushed by a bipartisan coalition, would allow states to go forward with legalization unencumbered by threats of federal prosecution. Sessions, by contrast, has ramped up those threats and has also lobbied Congress to reduce current protections for medical marijuana.

Trump made his comments to a gaggle of reporters Friday morning just before he boarded a helicopter on his way to the G-7 summit in Canada. His remarks came the day after the bipartisan group of lawmakers proposed their measure.

One of the lead sponsors is Sen. Cory Gardner (R-Colo.), who is aligned with Trump on several issues but recently has tangled with the administration over the Justice Department's threats to restart prosecutions in states that have legalized marijuana.

"I support Sen. Gardner," Trump said when asked about the bill. "I know exactly what he's doing. We're looking at it. But I probably will end up supporting that, yes."

The legislative proposal, which is also championed by Sen. Elizabeth Warren (D-Mass.), would reshape the legal landscape for marijuana if it becomes law. California and eight other states, as well as Washington, D.C., have legalized all adult use of marijuana. An additional 20 states permit marijuana for medical use. But even as states legalize, marijuana has remained a risky and unstable business because of federal law making it illegal. Concerns about federal law enforcement seizures have inhibited most lenders from working with marijuana businesses. And investors have also proceeded cautiously.

"If you are in the marijuana business . you can't get a bank loan or set up a bank account because of concern over the conflict between state and federal law," Gardner said at a news conference Thursday to unveil the new bill. "We need to fix this. It is time we take this industry out of the shadows, bring these dollars out of the shadows."

He called it a "public hypocrisy" that the firms are expected to pay taxes yet are barred from participation in the financial system.

A lifting of the federal prohibition also would bolster efforts to create uniform testing and regulatory standards for marijuana, and potentially free scientists to pursue research into the medical uses of marijuana.

Trump's support could potentially have a major impact, providing political cover for Republicans who worry about being tagged as soft on drugs. Still, the proposal faces a tough road in Congress.

Even though most lawmakers now represent areas where pot is legal for at least medical use - and public opinion polls show majorities of Democratic and Republican voters nationwide favor legalization - congressional leaders have shown little appetite for loosening restrictions. The House is blocking the District

of Columbia from permitting sales of recreational pot, even after its voters chose to legalize. A 2014 budget amendment that protects medical marijuana businesses from Drug Enforcement Administration raids is perpetually under attack.

"It faces tremendous head winds," John Hudak, a marijuana policy expert at the Brookings Institution in Washington, said, referring to the Gardner-Warren bill. Trump said he is likely to support the federal legalization effort despite a warning against it from a coalition of narcotics officer groups.

"We urge you to see through the smoke screen and reject attempts to encourage more drug use in America," they wrote in a letter to Trump Thursday.

The marijuana industry continues to be whipsawed by mixed messages from the administration.

In January, the Justice Department sent pot businesses into a panic by rescinding an Obama-era policy that restricted prosecutors from targeting sellers who operate legally under state laws. Sessions warned at the time that any pot business could find itself in the crosshairs of prosecutors - regardless of whether marijuana was legal in their state.

The move enraged Gardner, who said the administration had earlier given him assurances that there would be no such raids, at least in his state. At Gardner's behest, Trump in April ordered an abrupt retreat from the announced crackdown. Trump made the order without even consulting Sessions, a sign of their tense relationship.

But prosecutors did back off. During this administration, there have apparently been no federal raids or seizures of pot companies for sales that are legal under state law.

"Remarkably little, if anything, has changed," said John Vardaman, a former Justice Department attorney who helped draft the Obama-era rules, known as the Cole memo, after former Deputy Atty. Gen. James M. Cole, who issued it. "Almost every U.S. attorney in states where marijuana is legal has decided to apply the same principles as the Cole memo," said Vardaman, now an executive at Hypur, which sells banking compliance software to marijuana companies.

Banking is the area in which the Gardner bill could most help pot companies. The Senate proposal, and a companion bipartisan measure in the House, would amend the Controlled Substances Act so that its marijuana provisions do not apply to any person or business that is in compliance with state laws. To put bankers at ease, it specifies that such marijuana sales would not be considered trafficking and do not amount to illegal financial transactions.

"The very people you want involved in this market are the ones who have been most reluctant to get involved because of the banking issue," said Vardaman. "If you address that, you would have enormous beneficial effects for the industry."

While Trump's comments were welcomed by marijuana activists, they remain on edge, especially because of Trump's spotty record at actually pushing legislation through Congress.

"We have seen this president voice his support for a lot of things related to cannabis, but he has done absolutely nothing to move legislation," said Hudak. "This is just more empty rhetoric from a president who is vague on this issue."

Gardner is hoping he can persuade more of his conservative colleagues to join the crusade by framing the issue as one of state's rights. Several Republicans, including Reps. Dana Rohrabacher of Costa Mesa and Don Young of Alaska, are demanding an end to federal marijuana laws that intrude on the states. Their movement is slowly growing in Congress.

"This is a chance for us to express that federalism works," said Gardner, who like some other Republicans was not a proponent of marijuana but took up the cause

after his state's voters endorsed legalization, "to take an idea that states have led with and provide a solution that allows them to continue to lead."

ARTICLES OF INTEREST:

SUPREME COURT WARY OF POLICE USE OF TECHNOLOGY

NEW RULES ON TAXES

Craft Brewer Wants To Stop Miller's Keystone Rebranding

Source: Law 360
By Suzanne Monyak
June 1, 2018

Stone Brewing Co. has asked a California federal judge to stop MillerCoors from selling Keystone beer in rebranded cans that emphasize the word "Stone," arguing that the new label risked confusion between the craft brewer and its "evil twin."

The California brewery on Thursday moved for a preliminary injunction against the international beverage giant, saying the rebranding efforts damaged Stone Brewing's reputation for "independence and pugnaciously hoppy beer."

The craft brewery said Keystone's brand is the "evil twin of all things Stone stands for and holds dear," describing the product as a "bargain-basement, watered-down, low-alcohol light beer."

"The irreparable harm to Stone's goodwill is painfully obvious," the motion says. "Stone is synonymous with excellent craft beer. By contrast, Keystone is a mass-produced 'value' brand whose flavor is a perennial subject of mockery and scorn among consumers."

The trademark dispute stems from MillerCoors' decision in April 2017 to roll out a rebranded line of Keystone beer cans.

Where the old packaging featured an image of the Colorado Rockies, the new labels feature "Stone" in large font emblazoned on the side with "Key" printed in smaller font above.

Stone Brewing, which is known for beers with names like Arrogant Bastard Ale, originally sued MillerCoors over the new campaign in February, accusing the company of trying "steal the consumer loyalty and awesome reputation of Stone's craft brews."

In its preliminary injunction bid, Stone Brewing argued there was a high likelihood that customers would mix up the brands because both brewers sell the same kind of beverage through the same distributors at the same stores.

The craft brewer asked the judge to "halt this onslaught and protect one of California's most prized craft beer brands from permanent injury."

Among other things, the motion notes that MillerCoors instructed retailers to display its newly designed cans with the word "Stone" facing outward and launched a large-scale advertising campaign to announce the rebranding.

Stone Brewing maintains the infringement is willful. The motion points to the U.S. Patent and Trademark Office's refusal to grant MillerCoors a trademark for "Stones" in 2007 because it would cause confusion Stone Brewery's 1998 trademark for "Stone."

The smaller brewery also cited several examples in its motion of customers confusing the two brands. Stone Brewing said it conducted a study that found more than 43 percent of beer drinkers had believed that Keystone's new label was likely somehow endorsed by or affiliated with Stone.

But the real coup de grace, Stone Brewing warned, was an email from a confused customer inquiring about "Stone Light." The thought that the craft brewery would sell a product like Keystone Lite was "anathema to Stone's founding principles and existence," the motion says.

"For a brand that has spent over 20 years adamant that it does not brew light beer, this was a stinging blow," according to the motion.

Representatives for MillerCoors did not immediately respond to requests for comment Friday, but in its answer to the complaint, it said that Stone Brewery's lawsuit was "meritless" and an attempt to profit off the idea that there is a "war between 'big beer' and 'craft beer.'"

A spokeswoman for Stone Brewery declined to comment.

Stone Brewing is represented by J. Noah Hagey of BraunHagey & Borden.

MillerCoors, a subsidiary of Molson Coors Brewing Co., is represented by Natalie Hanlon Leh, Vinita Ferrera and Christopher T. Casamassima of Wilmer Cutler Pickering Hale and Dorr.

The case is Stone Brewing Co. LLC v. Molson Coors Brewing Co. et al., case number 3:18-cv-00331, in the U.S. District Court for the Southern District of California.

June 27

MATCH AND SNATCH OFFICIALLY BANNED FOR LARGE SUPPLIERS IN NORTH CAROLINA

North Carolina's House Bill 500 became law in the Tar Heel State yesterday. This bill, as you may recall, included a number of wholesaler successor provisions. Most notable was one that bans a supplier's ability to match and snatch (or match and redirect as breweries call it) if the supplier makes up more than 5% of a selling wholesaler's business.

That provision did not sit well with Anheuser-Busch, as we reported last week, and the brewer (as well as other suppliers we hear) made a late minute push to try and sway North Carolina Governor Roy Cooper to veto the bill.

The Governor did veto a total of seven bills on Monday, the last day he could take formal action on the 45 bills sitting on his desk, but HB 500, of course, was not one of them.

Gov. Cooper left HB 500 and five other bills unsigned, making them law when the clock struck midnight in North Carolina on Monday.

So long story short: HB 500 is now official and in effect in the Tar Heel State.

That means three things, as it relates to you dear readers:

- A big supplier (one that makes up more than 5% of a selling wholesaler's business) is no longer allowed to exercise its match and snatch clause.
- Owners of wholesalerships in the state are now able to transfer their interest in the company to a designated family member while still alive.

- And finally, a supplier is no longer allowed to acquire, possess, or otherwise maintain an ownership interest in a wholesaler. "That means no special financing arrangements provided by the supplier," Tim Kent, executive director of North Carolina Beer & Wine Wholesalers Association, said in a statement announcing the new law to members.

Although we know of at least one wholesaler in the state that is peeved with the new law, Tim maintains that the state's bev alc wholesalers are now "in a much better position to determine how, when and to whom their business will be sold."

North Carolina: Craft-beer lawsuit uncovers 'illegal activity,' attorney says

Source: https://www.bizjournals.com/

By Jennifer Thomas
June 5, 2018

A lawsuit brought by Charlotte's largest craft brewers has uncovered illegal activity amid efforts to overturn North Carolina's self-distribution laws, according to an attorney representing them.

Initial discovery exposed a "secret agreement" between Anheuser-Busch and distributor R.A. Jeffreys that gives sales of those beers priority over all other products - illegal under a 1989 state law, says Drew Erteschik, co-counsel for The Olde Mecklenburg Brewery, NoDa Brewing Co. and the Craft Freedom initiative.

Those craft brewers are suing North Carolina, alleging the state artificially suppresses economic growth through two unconstitutional laws - the distribution cap and franchise law.

The court's ruling will impact brewers' ability to increase production and continue to distribute their own products. Current law requires brewers to hand over their rights to private distributors if they sell more than 25,000 barrels.

Discovery in that case is slated to ramp up after an N.C. Superior Court judge denied motions to dismiss the case and declined to reassign it to a three-judge panel.

The fact-finding process will continue unless an appeal is filed or until the case is ready to return to the courtroom.

"The court's decision allows the case to move forward, closer to a trial, where we are confident we will prevail," Erteschik says.

Additional subpoenas already have been issued to various distributors following the court's decision, seeking information about political contributions as well as communications involving their lobbyists.

"Now that we have the right to conduct full discovery, we expect to uncover even more evidence of illegal activity," Erteschik says.

It also means the lawyers can build on early revelations.

For example, initial discovery included the deposition of ABC Commission Administrator Bob Hamilton. Hamilton was presented with the Anheuser-Busch/R.A. Jeffreys agreement - and acknowledged the agreement appeared to be illegal.

"If I have a copy of this, I'm going to look into it. I'm going to send it to ALE. I'm going to have them do a review, an investigation into this. If they find that they were discriminating [with] the retailers, then they are going to be held up on violations of that discrimination part of the statute and they'll have to answer to that," Hamilton said during that deposition.

The lawsuit centers around a 25,000-barrel cap that craft brewers face when it comes to self-distribution. Erteschik says those laws violate the N.C. Constitution - but also are wrong as a matter of policy.

"This is an economic protectionism scheme that enriches one private party at the expense of another," Erteschik says.
He adds it's possible for the N.C. General Assembly to change those laws proactively, "rather than wait for the courts to strike them down."

Three Social Media No-Nos For Wine Producers

Liza B. Zimmerman
Contributor
Jul 9, 2018, 10:01am 1,939 views #Regulation
The U.S. wine market is still tightly regulated by the so-called Tied House rules, which have been in place since the repeal of Prohibition in 1933. They were designed to not allow any one tier of the business to have "undue" control of wine sales. However, their final legacy seems to be curtailing the social media market in some odd ways.
John Trinidad, senior consul in the Napa-based office of law firm Dickenson, Peatman & Fogarty, recently spoke at a seminar at the Sonoma County Bar Association conference, detailing what might seem to be silly foibles that wineries shouldn't make lest they cross the legal line. Some of them were not particularly obvious, so winery owners and their marketing teams should look, and research, before they leap with new marketing initiatives.
John Trinidad shared his perspective on the legal rights and wrongs of social media.Duncan Garrett
Trinidad notes that, at least ostensibly, the "Tied House rules were created to level the playing field."
Any type of social media that directs consumers to a single retail outlet can pose a problem. Even listing a specific price of a wine, should it be linked to a retailer, posed an issue. The three-tier system strictly prohibits "providing a thing of

value," such as any kind of promotion to a single retailer. That can show a preference, on the part of an importer or producer, that is not legally permitted. Special dispensations are allowed for winery professionals to promote and pour at specific restaurant and winemaker dinners. "These are exceptions created in part to allow wine and food to be served together," he notes.

A beverage industry expert, who preferred to remain off the record, said that many of these laws are outdated and serve little purpose these days. However they are still officially enforced.

Negativity about other producers or retailers is not allowed either. So judgmental statements of any kind will not legally fly on social media.

Last, but not least, wineries may not promote their products to an audience deemed to be less than 71.6% of legal drinking age. This odd percentage is based on Nielsen data. Many wineries would be lucky to be able to pay for such data and even smarter to know that they needed it.

So while Instagram may seem to be a wine-friendly place, wine producers need to do their homework ahead of time.

Court Finds That "Marijuana" is Distinct and Separate From "Cannabis"

Tuesday, July 3, 2018

This week in State of Arizona v. Rodney Christopher Jones, the Arizona Court of Appeals held in a 2-1 decision that marijuana concentrates do not fall under the protections of the Arizona Medical Marijuana Act (AMMA). The court determined that the AMMA, by not specifically including a form of extracted resin, namely Hashish, within its description of marijuana, adopts a distinction between marijuana and its concentrates that the Arizona Supreme Court made in the seventies. See State v. Bollander, 110 Ariz. 84 (1973). In essence, the Appellate Court found that "marijuana" is distinct and separate from "cannabis," which the court believes includes extracts. The court did, however, carve out "consumables" from the prohibited cannabis extracts. The protected consumables combine marijuana with non-marijuana elements and include "brownies and the like."

We recognize the confusion this decision causes. This appellate ruling is inconsistent with the interpretation and function of the AMMA since its enactment and the Arizona Department of Health Services' own regulations of the AMMA - a fact that the dissent in this case recognized. The court does not seem to understand the various forms and production of marijuana - the distinction the court makes between concentrates and other forms of marijuana allowed by the AMMA is simply not tenable. Marijuana concentrates are not only a mainstream and acceptable present-day use of medical marijuana, they are also the most effective form of treatment for certain ailments.

At present, indications from the Arizona Department of Health Services appear to be that concentrates still fall under the AMMA. Still, we are engaging with the issues evolving from this decision and are presently conducting analysis regarding its implications. We are also considering legal recourse, including involvement in a reconsideration of the opinion and an appeal to the Arizona Supreme Court.

Wine Co. Shareholder Must Hand Investor $29M, Judge Says

Source: Law360

By Shayna Posses

June 4, 2018

A Florida federal judge slapped a controlling shareholder in a Chilean wine company with a $28.7 million judgment Monday, after finding for a Delaware-based investor in its dispute seeking to confirm an arbitration award stemming from the soured business venture.

The final judgment for investor EGI-VSR LLC comes after U.S. District Judge Robert N. Scola Jr. on Thursday rejected controlling shareholder Juan Coderch's efforts to dismiss the petition to confirm a Chilean arbitration award, which the American company said he had been dodging service of in multiple countries to avoid coughing up the money.

The judge first declined to upset a Brazilian court's determination that Coderch was properly served in the country, which is where his brother allegedly said he was living when EGI-VSR tried to enforce the award in Chile. The Viña San Rafael SA controlling shareholder points to no legal authority indicating that the Florida federal court should review a Brazilian court's determination that service of process was properly carried out under Brazilian law, the judge held.

"Nevertheless, even if the respondent's challenge were proper, he has not presented strong and convincing evidence that the process undertaken in Brazil was improper or insufficient," the judge said, adding, "There was ample evidence presented to the Brazilian court to substantiate its finding that the respondent was evading service."

After rejecting Coderch's motion to quash service of the petition, Judge Scola rejected the shareholder's challenge to EGI-VSR's request for confirmation of the award, declaring his arguments "misplaced."

For example, Coderch asserted that the award isn't recognizable under Florida's Uniform Out-of-Country Foreign Money Judgment Recognition Act, which governs the enforcement of foreign judgments in the state. The statute defines "out-of-country judgments" as judgments by a foreign state granting or denying the recovery of a monetary sum, so, Coderch contended, since the arbitrator in this matter detailed how to calculate the amount owed without actually doing the math, the award isn't recognizable, according to the opinion.

But Judge Scola wasn't swayed, saying the shareholder hasn't cited any authority showing that the final award qualifies as a judgment under the Uniform Act and the court isn't persuaded that it should because the award was handed down by an arbitrator, not a foreign state.

The dispute stems from an agreement in which EGI-VSR said it would buy 4.2 million preferred shares of stock in Viña San Rafael, a private company that produces and distributes wines. Eventually, EGI-VSR bought more than 7.5 million shares for a total investment of about $17 million, which gave it a minority interest in the wine company, according to the investor.

Under the terms of the agreement, a breach by controlling shareholders would trigger a put-right for EGI-VSR that would require the controlling shareholders to buy all of the investor's shares. After a series of issues, EGI-VSR exercised that right in October 2009 and invoked an arbitration clause in the agreement, the investor said.

A Chilean arbitrator determined that the controlling shareholders had indeed violated several sections of the agreement and ordered them to buy EGI-VSR's shares in January 2012, according to the investor.

However, EGI-VSR alleged, its efforts to enforce the award led to the investor chasing Coderch across several countries. In January 2015, the investor filed the present Florida federal court petition seeking to confirm the award under the Panama and New York conventions and get an order setting forth the total price Coderch should pay, but subsequently secured a stay as it attempted to serve him, court filings said.

EGI-VSR said it tried to enforce the award in Chile, but Coderch's brother swore to the court that he could not be served because he was living in Brazil. The bailiff then tried to serve him at his apartment in Brazil, only to be told by the doorman that he was directed by Coderch's wife to tell all bailiffs that he lived abroad, according to EGI-VSR.

After some more back and forth, the investor went to the Superior Judicial Tribunal in Brazil, which found that he had been properly served under that country's laws. Judge Scola subsequently reopened the Florida federal court case in October, according to court filings.

In response, Coderch asserted that he hadn't been properly served and that the award couldn't be confirmed as EGI-VSR has calculated it, but he failed to win over the judge Thursday. The shareholder has provided no reason to take up, let alone overturn, the Brazilian court's decision that he was actively evading service, and his arguments against confirmation are no more availing, Judge Scola held.

The judge concluded that Coderch hasn't shown that any of the Panama Convention's exceptions to confirming an arbitration award apply, nor is there any weight to his contention that the judgment EGI-VSR seeks relies on improper calculations, as the investor simply followed the procedure laid out in the final award.

Coderch promptly objected to the investor's proposed final judgment Friday, saying, "Confirming the arbitral award entails ordering specific performance to purchase shares in Viña San Rafael, not issuing a judgment for a sum of money upon which EGI may attempt to execute."

But the judge nonetheless issued a final monetary judgment.

Andrew W. Vail told Law360 on Monday that the court's order and judgment further demonstrate that Coderch cannot hide from his legal obligations to EGI-VSR or the law.

"We will continue to pursue Coderch and others involved in his conduct like his brother and family as appropriate until justice is done," he said.

The attorney noted that there are ongoing proceedings in other forums against Coderch and other respondents in the arbitration in connection with EGI-VSR pursuing the award.

Representatives for Coderch didn't immediately return requests for comment Monday.

EGI-VSR is represented by Detra Shaw-Wilder of Kozyak Tropin Throckmorton LLP and Andrew W. Vail of Jenner & Block LLP.

Coderch is represented by Kevin P. Jacobs, Gregory J. Trask, Rayda Alemán and Christopher King of Homer Bonner Jacobs.

The case is EGI-VSR LLC v. Coderch, case number 1:15-cv-20098, in the U.S. District Court for the Southern District of Florida.

Supreme Court Takes Another Step to Keep Up With the Digital Times: Criminal Procedure and Cell Phone Records in Carpenter

Sunday, July 8, 2018

Personal location information held by a third party now receives heightened protection from disclosure to law enforcement

Thanks to Timothy Ivory Carpenter, Cell Site Location Information ("CSLI") is now part of our vernacular. More important, in light of the Supreme Court's June 2018 ruling in Carpenter v. United States, a company's collection and retention of a person's historical whereabouts (location information) now receives heightened protection from search and seizure by law enforcement.

Simply put, CSLI is a personal location record created when a cell phone connects to a nearby cell tower site. In Carpenter, the government received 127 days of Mr. Carpenter's CSLI without a warrant.[1] This data made it possible for law enforcement agents to recreate Mr. Carpenter's daily whereabouts over a four-month period with granular precision unlike other surveillance means available (i.e., store video cameras or witness recollection). At trial, the government offered this data as corroborating evidence to place Mr. Carpenter near the location of four of the charged robberies around the time those four robberies were committed. Mr. Carpenter was convicted and sentenced to nearly 116 years' of imprisonment.

The collection of this data makes "it possible to reconstruct in detail everywhere an individual has traveled over hours, days, weeks, or months."[2] As Chief Justice Roberts plainly states, "the question [confronted] today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals."

Before Carpenter, CSLI data held by a third party was considered simply a business record that did not require a search warrant. That has changed. Now,

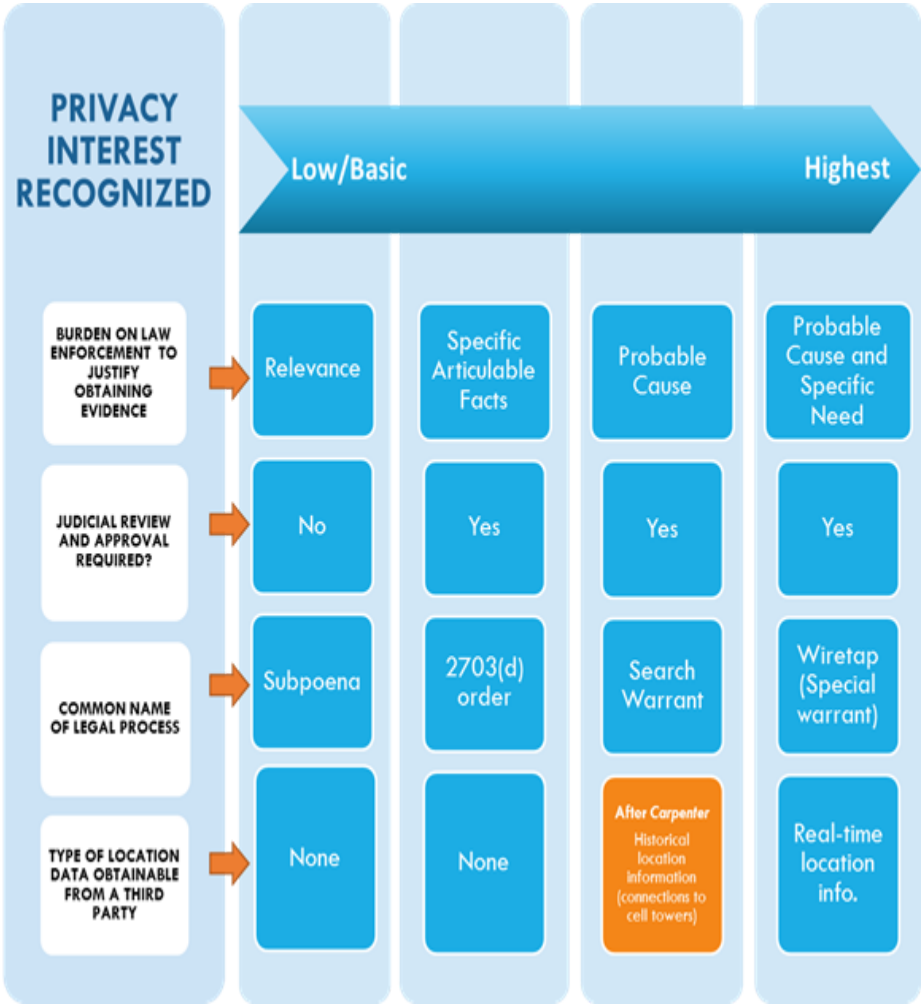
acquisition of CSLI I is "a search within the meaning of the Fourth Amendment." [3] Because an individual maintains a legitimate expectation of privacy in CSLI data, "the Government must generally obtain a warrant supported by probable cause before acquiring such records."[4]

Legitimate Reasons for Collecting or Disclosing CSLI

While your historical location data may seem like a futuristic big-brother phenomenon, providers collect this type of information to manage bandwidth and capacity, ensure quality of service and other benign purposes. Historical location information can be instrumental in law enforcement putting individuals near the scene of a crime at the time it occurred or meeting with co-conspirators at a weapons store. Location records can also be exculpatory evidence, such as proving a person was not near the scene of a crime when it happened, or never visited a location law enforcement believes to be important in proving the case.

Carpenter, Heightened Privacy Interests and Law Enforcement Burden to Justify Obtaining Location Information

Carpenter altered a long-standing practice of criminal procedure. The higher the privacy interest recognized in certain information (evidence) sought, the higher the burden on law enforcement to be able to obtain the evidence. For example, obtaining name, address and account number receive lower protection and require only a subpoena based on a law enforcement officer's belief that information sought is related to an ongoing criminal investigation, without much more. On the other hand, obtaining real-time location information and content of communications (i.e., a wiretap) receive some of the highest protections. (See chart below.) Under Carpenter, historical location records carry a heightened privacy interest. Law enforcement can no longer obtain historical location records by using a simple subpoena.



Carpenter - next in a line of Fourth Amendment cases finding heightened privacy interests in certain digital personal information

As digital technology continues to advance, courts will continue to wrestle with the Fourth Amendment implications. In fact, two prior Supreme Court decisions about emerging technologies shaped the Carpenter decision:

In 2012, in a marked departure from long-standing precedent, the Court decided United States v. Jones. In Jones, the FBI attached a GPS device to a suspect's vehicle without a warrant. As a result, the government was able to remotely monitor Mr. Jones whereabouts for 28 days. The Court held that even though vehicular movements are disclosed to the public at large, individuals still have a reasonable expectation of privacy in their long-term whereabouts. As such, the government must obtain a warrant before it uses this type of technology to surveil suspects.

Two years later, the Court was called upon to answer the privacy interests raised by a "feature of human anatomy," the cell phone.[5] In Riley v. California, the government did not obtain a warrant before it searched Mr. Riley's cell-phone incident to his arrest. Further departing from decades-old exception to the search warrant requirement, the Court held that the unique capacity of cell phones and their ability to contain every intimate detail of a person's life trigger a privacy interest in a person's cell phone stored contents and data. As a result, police officers must generally obtain a warrant before searching a cell phone incident to an arrest.

How Carpenter Will Impact Many Organizations

Although Carpenter changes law enforcement investigative techniques, the decision also signals technology providers to consider changing their practices. According to the Amici Curiae brief filed by technology companies:

> Amici have a substantial interest in the legal standards governing law-enforcement access to data about their customers. Those customers entrust amici with some of their most intimate information, including what they search, where they are, and details of their daily lives. Given the sensitivity of this data, amici work continuously to secure their customers' privacy.

Undoubtedly in the coming months, organizations that record and store information about individuals' whereabouts, e.g., cell phone providers, internet service providers, fleet monitoring service providers, GPS and smart car services may consider re-examining their data retention policies, privacy policies and focusing closely on their subpoena and warrant compliance practices in light of Carpenter. Our teams collaborate to help organizations review internal procedures in light of this ruling.

[1] In Carpenter, the government did obtain an order under the Stored Communications Act ("SCA"). To obtain an order under the SCA, the government need not show probable cause. Instead, it needs only to "offer[] specific and articulable facts showing that there are reasonable grounds to be that . . . the records or other information sought[] are relevant and material to an ongoing criminal investigation." 18 U.S.C. 2703(d). For Carpenter, the government mentioned Mr. Carpenter's name "only once in a conclusory sentence at the end" of its application. Trn. of Oral Argument at 22:1-3.
[2] Pet. Brief at 3.
[3] Carpenter v. United States, 585 U.S. __, ___ (2018) (slip op., at 17).
[4] Id. at 18.
[5] Riley v. California, 573 U.S.__, __ (2014) (slip op., at 9).

$29 Million Award Against Chilean Wine Producer and Distributor
The dispute stemmed from a $17 million investment EGI-VSR made in Vina San Rafael ...
by Kerana Todorov
June 22, 2018
A US federal judge has ordered a Chilean wine producer and distributor to pay nearly $29 million to a US-based investor, enforcing an arbitration award reached in Chile after the investment went sour, according to court filings. The judgment, decided June 4, was appealed Monday.

U.S. District Judge Robert Scola Jr on June 4 ordered Juan Carlos Celestino Coderch Mitjans to pay the award in US dollars to Chicago-based EGI-VSR LLC, a minority shareholder in Coderch's Vina San Rafael S.A. EGI-VSR's Chicago address is the same as Equity Group Investments', a company chaired by billionaire Sam Zell.

The dispute argued in the federal court in Miami stemmed from a $17 million

investment EGI-VSR made in Vina San Rafael over a four-year period beginning in 2005, according to court records.

In 2009, EGI-VSR sought to have Vina San Rafael's controlling shareholders, including Coderch, buy back these shares, alleging the Chilean wine producer and distributor had breached provisions in the 2005 agreement, according to court records.

A Chilean court arbitrator concluded in 2012 Vina San Rafael had violated the terms of the 2005 agreement, according to court records. The arbitrator, Vasco Costa Ramirez, ordered Vina San Rafael's majority shareholders, including Coderch, to buy back EGI-VSR's shares, according to court records. Chilean courts subsequently affirmed the decision.

The Chilean arbitrator found the infractions included issuing preferred shares in Vina San Rafael without prior consent from EGI and having received non-monetary assets for the share and approving the revalued value of such assets, according to court filings.

In January 2015, EGI-VSR petitioned the South Florida District Court to have the award enforced under the Panama and New York conventions dealing with the recognition and enforcement of international arbitration cases. The case was filed in Florida, where Coderch owns multiple businesses, according to court records.

EGI-VSR's representatives sought to serve Coderch with papers for nearly two years in Chile and Brazil, where he reportedly lived, according to court filings. A Brazilian lawyer working on behalf of the plaintiff reported a photo published in a magazine showing Coderch and his family throwing a lavish party at their penthouse in Rio de Janeiro, according to court documents filed by the plaintiff.

Eventually, a Brazilian court found that Coderch was evading service and ruled that he could be legally served if the papers were left at the complex with either a relative or a neighbor, according to the filings.
Coderch unsuccessfully tried to have Scola throw out the case alleging he had been improperly served in Brazil, according to court records. Coderch argued he had left Brazil for a farm in Paraguay, according to court filings. Scola denied Coderch's request.

Scola also denied Coderch's motion to dismiss the case in Miami because the U.S. District Court was the wrong venue.

Andrew Vail, of Jenner and Block LLP of Chicago, represents EGI-VSR. Other efforts are being made to force Coderch to pay. "The appeal is wholly without merit," Vail also said this week.
One of Coderch's attorneys, Christopher King, an attorney with Homer Bonner Jacobs of Miami, declined to comment on the case. "We'll let the appeal play out," King said Wednesday.

WSWA Applauds Ruling to Dismiss Missouri Retail-Direct Shipping Case

WASHINGTON - Wine & Spirits Wholesalers of America (WSWA) today applauded a Missouri judge's decision to dismiss a lawsuit that attempted to compel Missouri to let out-of-state retailers ship alcohol directly to Missouri residents, circumventing the state's distribution system (*Sarasota Wine Market v. Parson*). The ruling reinforced the legitimacy and importance of the state's system of beverage alcohol distribution and sale.

The ruling was issued June 15 by the U.S. District Court for the Eastern District of Missouri. District Judge Henry Autrey dismissed the suit "because the challenged statutes do not result in discrimination between in-state and out-of-state producers or products, and because the statutes are legitimate exercises of Missouri's authority under the Twenty-first Amendment, [so] the Complaint fails to state a Commerce Clause claim upon which relief can be granted."

The ruling also noted that, "to allow out-of-state retailers to ship directly to Missouri residents would not only burden in-state retailers, who would have to operate within the . . . system while out-of-state retailers could circumvent the Missouri regulatory system entirely, it would also violate the Twenty-first Amendment by undermining Missouri's 'unquestionably legitimate' system."

"For more than eight decades the Twenty-first Amendment has given states the right to regulate alcohol and oversee licensees as the primary regulatory authority," **WSWA President and CEO Craig Wolf said**.

"This ruling reaffirms the legitimacy of state regulatory authority under the Twenty-first Amendment and the benefits provided by the three-tier system, including efficient tax collection, protection against tainted and counterfeit alcohol, a balanced marketplace and the widest choice of beverage alcohol products available anywhere in the world today," **Wolf added**.

This decision follows a similar Illinois ruling issued last year; both have consistently upheld the state's beverage-alcohol distribution system. View Judge Autrey's full opinion here.

Wine Distributor Agreements Not Intoxicating Liquor Dealerships Under

Fair Dealership Law

Joe Forward

Author's note: This article was updated on June 26, 2018 at 5:15 p.m. to clarify the court's ruling.

June 13, 2018 - In an unusual certification from the U.S. Court of Appeals for the Seventh Circuit, the Wisconsin Supreme Court has ruled (4-3) that wine distribution agreements are not intoxicating liquor dealerships subject to special provisions under the Wisconsin Fair Dealership Law (WFDL).
Capitol-Husting Co. Inc. and another wine distributor argued that importer Winebow Inc. could not unilaterally terminate their business relationship under the WFDL, Wis. Stat. chapter 135, which says intoxicating liquor dealerships cannot be cancelled unless the grantor shows good cause to cancel the agreement.

But Winebow argued that showing good cause was not needed because the wine distributors are not protected by the WFDL provisions related to "intoxicating liquor" dealerships, since wine is not considered an "intoxicating liquor.
The Seventh Circuit Court of Appeals certified the case to the state Supreme Court to ask whether the definition of a "dealership" includes wine grantor-dealer relationships.
Recently, in Winebow Inc. v. Capitol-Husting Co., Inc., 2018 WI 60 (June 5, 2018), a 4-3 majority concluded that wine grantor-dealer relationships are not included.
Attorney Mike Wittenwyler, who filed an amicus brief on the case in the Seventh Circuit, said the Supreme Court's decision maintains the status quo in that the WFDL will only apply to wine under the so-called community of interest test, and not the 5 percent test.

Wis. Stat. section 135.02(3)(b) says a "dealership" includes contracts or agreements by which a wholesaler "is granted the right to sell or distribute intoxicating liquor. ..."
Under section 135.066(2)(a), "intoxicating liquor" has the meaning given in s. 125.02(8), "minus wine." Section 125.02(8) includes "vinous liquors," but Winebow argued that the "minus wine" language trumped the "vinous liquors" language in the cross reference.
The Supreme Court majority agreed. "[S]uch definition explicitly excludes wine," wrote Justice Ann Walsh Bradley. "[W]e answer the certified question in the negative."
"If the court here were to decide that it is acceptable to effectuate a definition from ch. 125 that is not referenced within ch. 135, there would be no clear stopping point to such a practice," wrote Justice A.W. Bradley.
The U.S. District Court for the Eastern District of Wisconsin ruled that Winebow could terminate the agreements unilaterally without cause because the WFDL did not apply. The Seventh Circuit Appeals Court asked the state Supreme Court to weigh in.

The Supreme Court noted that the state legislature, in 1999, broadened the WFDL's protections to include distributors of "intoxicating liquors," but then-Gov. Tommy Thompson used his veto pen to expressly exclude wine from the definition.
Dissent

Justice Rebecca Bradley wrote a dissent, joined by Justices Shirley Abrahamson and Daniel Kelly, concluding that the legislature clearly intended to include wine distributers within the WFDL and Gov. Thompson clearly intended to exclude them.

"But legislative intent behind enactment of a law - or executive intent motivating the exercise of a veto - cannot govern statutory interpretation," Justice R. Bradley wrote.
The dissenters said the provision at section 135.066(2)(a), which includes the "minus wine" language, does not apply to the whole chapter.
"Everyone agrees that vinous liquors include wine," R. Bradley wrote.
"Construing the text of these statutes leads us to the inexorable conclusion that the wine distributors are wholesalers whose agreements with Winebow create dealerships protected by ch. 135.

"The majority adopts a statutory construction that rewrites ch. 135 by subtracting language from it, rather than giving effect to every word. The majority errs."

June 20, 2018

Interstate Shipping Debate Comes to Cali

Dear Client: Wine & Spirits Daily

There's more fuel to add on the fire that is interstate shipping debate. This time, Florida-based Orion Wine Imports filed a lawsuit against California, challenging the laws that prohibit out-of-state wine importers from selling directly to retailers in the state.

In California, importers and wholesalers based outside the state must first sell to an importer or wholesaler in California, even though in-state importers don't have to. Orion argues that adds distribution costs to out-of-state importers that in-state ones don't face, which violates the Commerce Clause and the Privileges and Immunities Clause, per the complaint.

Orion claims the laws could prevent it from selling and delivering some of its wine in California altogether "if the demand is so small or the wine is so new and unknown that no wholesaler will agree to carry it." Moreover, they have no plans to open a facility in California and "cannot afford to do so."

As such, Orion is seeking an injunction to stop the California Department of Alcoholic Beverage Control from enforcing the aforementioned statute.

THE BIGGER PICTURE. California is just the latest in a string of states that are dealing with interstate shipping lawsuits. Others include: Illinois, Michigan, and then Missouri, which you'll recall, was recently dismissed.

Following the Missouri case dismissal, The Wine & Spirits Wholesalers of America came out in support of the judge's ruling. "This ruling reaffirms the legitimacy of state regulatory authority under the Twenty-first Amendment and the benefits provided by the three-tier system, including efficient tax collection, protection against tainted and counterfeit alcohol, a balanced marketplace and

the widest choice of beverage alcohol products available anywhere in the world today," says WSWA chief Craig Wolf.

An important footnote to this story is that the same law firm representing Orion--Epstein Cohen Seif & Porter--is also representing the retailers in the Illinois and Michigan cases, and furthermore, is connected to Robert Epstein, the attorney who argued in favor of wineries being given interstate shipping in the Granholm v. Heald case in 2005 [see WSD 06-19-2018].

So for our money, we're expecting interstate shipping rights for retailers will continue to make headlines in the coming years.

MO DISTRICT COURT STRIKES BLOW AGAINST OUT-OF-STATE RETAILER SHIPPING June 18

On Friday, Missouri District Court Judge Henry Autrey dismissed Florida retailer Magnum Wine and Tastings' (second) case against the state over allegedly discriminatory shipping laws.

BACKGROUND. In 2016, Magnum Wine and Tastings filed suit against Missouri because the state allowed Missouri retailers to sell, ship and deliver wine directly to Missouri consumers while excluding out-of-state wine retailers violates the Commerce Clause and Privileges and Immunities law. Thus, discriminating against out-of-state wine retailers [see WSD 10-07-2016].

Fast forward to August 2017 when the retailer dropped its interstate shipping lawsuit after the state legislature repealed the statute that allowed in-state retailers to ship wine directly to consumers and prevented out-of-state retailers from doing the same [see WSD 08-01-2017]. That repeal essentially bans all retailer direct shipping. No retailer shipping, no discrimination, and thus no lawsuit. But it didn't end there.

The legislature repealed the statute that explicitly allows in-state retailers to ship directly, but the Missouri Division of Alcohol and Tobacco Control interpreted a separate statute that allows in-state businesses to operate as a retailer to implicitly allow retailers (including wine retailers) to deliver through a common carrier, which means out-of-state retailers are left out again. As a result, Magnum reignited the out-of-state shipping fight, filing another, similar lawsuit [see WSD 11-30-2017].

CASE DISMISSED. However, the court sided with the state, ruling that the case be dismissed because the retailer failed to show any "concrete injury," lack of subject matter jurisdiction and failure to state a claim, per court documents. The judge writes that the retailer failed to show any evidence of economic loss and that the claims are abstract and hypothetical.

In fact, the court found just the opposite of what Magnum claims. The statutes the retailer is challenging require that all alcohol sold directly to consumers must go through the state's four-tier system, and "to allow out-of-state retailers to ship directly to Missouri residents would not only burden in-state retailers, who would have to operate within the four tier system while out of state retailers could circumvent the Missouri regulatory system entirely," writes Judge Autrey.

But this may not be the last we hear from Magnum as the judge gave the retailer leave to amend the complaint, WSD

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