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Texas Wine Decision Adds New Fuel to the Fire on Interstate Shipping After *Granholm*

By Thomas A. McCann

As part of the latest judicial wrangling over interstate wine sales, a Texas district court judge has struck down the state's laws barring out-of-state retailers from selling wine directly to Texas consumers.⁶¹ However, the judge also ruled that Texas could continue requiring the out-of-state retailers to buy all the wine they sell in Texas from Texas-licensed wholesalers.⁶²

The ruling adds further confusion to states' regulation of wine merchants in the aftermath of a landmark 2005 U.S. Supreme Court ruling. In *Granholm v. Heald*, the Court struck down state laws that restricted direct sales from wineries to consumers across state lines.⁶³ However, that decision addressed only the tip of the iceberg when it comes to the nation's complex state-based system of regulating alcohol sales, which dates back to the end of prohibition in the 1930s.⁶⁴ The system, which had the byproduct of protecting in-state alcohol vendors from out-of-state competition, began to crumble with the advent of the Internet and online stores.⁶⁵ The Texas decision extends *Granholm* beyond wine producers to out-of-state retailers.⁶⁶

In the Texas case, a group of Texas wine consumers banded together with two wine retailers, one based in Florida and the other in California, to sue the state of Texas and the Texas Alcoholic Beverage Commission ("TABC"), arguing that the state laws at issue discriminated against interstate commerce in violation of the dormant

⁶¹ *Siesta Vill. Mkt. v. Perry*, 530 F. Supp. 2d 848, 874 (N.D. Tex. Jan. 14, 2008).

⁶² *Id.*

⁶³ *Granholm v. Heald*, 544 U.S. 460 (2005).

⁶⁴ David Kesmodel, *Wine Sellers Win One in Texas*, WALL ST. J., Jan. 18, 2008, at B5.

⁶⁵ Kesmodel, *supra* note 64.

⁶⁶ *Id.*

Commerce Clause.⁶⁷ Also intervening in the case were two licensed Texas wholesalers, who defended the statute's constitutionality and contested a temporary injunction that was allowing non-Texas retailers to compete against them in the state until the case was resolved.⁶⁸ The plaintiffs argued that the Texas statute allowed in-state retailers to sell and ship wine to at least some Texas residents, but denied that same right to out-of-state businesses.⁶⁹ The Texas statute at issue stated "any person in the business of selling alcoholic beverages in another state or country who ships or causes to be shipped any alcoholic beverage directly to any Texas resident. . . is in violation of this code."⁷⁰ A recent amendment to the code further restricted the rights of in-state retailers by forbidding any Texas retailers from shipping products to consumers outside of their specific county.⁷¹ However, the amendment did nothing to alleviate the limitations to the out-of-state competitors.⁷²

U.S. District Judge Sidney A. Fitzwater declared that a Texas statute implicates the dormant Commerce clause "if it discriminates against interstate commerce either facially, by purpose or by effect."⁷³ If a law does discriminate, it may still be valid if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.⁷⁴ However, even if the a Texas statute does not discriminate, it still could be struck down if it is "clearly excessive" in relation to the benefits of the statute.⁷⁵

The defendants argued that the prohibition on Texas retailers from selling outside their own counties made the advantage to Texas retailers too small and insignificant to be sufficiently discriminatory.⁷⁶ However, the district court disagreed, saying that the benefits Texas retailers had inside their counties under the law

⁶⁷ *Siesta Vill. Mkt.*, 530 F. Supp. 2d at 852; U.S. Const. art. I, § 8, cl. 3.

⁶⁸ *Siesta Vill. Mkt.*, 530 F. Supp. 2d at 853.

⁶⁹ *Id.* at 859.

⁷⁰ Tex. Alco. Bev. Code § 107.7(f).

⁷¹ Tex. Alco. Bev. Code § 22.03.

⁷² *Siesta Vill. Mkt.*, 530 F. Supp. 2d at 863-4.

⁷³ *Id.* at 862.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 864.

were far from insignificant.⁷⁷ The judge said the law did not prevent a Texas retailer from setting up brick-and-mortar shops in multiple counties and then shipping products directly to consumers in those counties. Out-of-state retailers would have access to none of those markets.⁷⁸ Also, the court stated that even the benefit to selling within a single county is large, noting that Harris County, which includes Houston, has a population that exceeds that of 24 other states.⁷⁹

The court stated “there is no ‘*de minimis*’ defense to a charge of discriminat[ion]” and that “[a] law that relies on the requirement of a physical, in-state location to afford some retailers the right to sell and ship wine to Texas consumers, while denying that same right to others who are located out-of-state, is therefore constitutionally suspect, regardless whether that right expands to the entire state or is restricted to a single county.”⁸⁰

The State of Texas and the intervenor wholesalers offered several justifications for the Texas statutes. The defendants argued that requiring in-state premises was necessary to protect consumer safety in conducting on-site inspections; that the laws were needed to prevent access by minors to alcohol; and that the laws were indispensable for the state’s tax revenue gathering because Internet retailers were much harder to tax.⁸¹ The court rejected each of these arguments, declaring they were not sufficient to justify a discriminatory law.⁸² As for protecting minors, the court said a state could just as easily require an adult signature on delivery and a label stating such instructions on each package.⁸³

Thus, the court struck down the Texas “citizenship requirement” forbidding out-of-state retailers from selling to Texas consumers, but it did not invalidate the state laws that require all alcohol retailers to sell through a licensed Texas wholesaler.⁸⁴

⁷⁷ *Siesta Vill. Mkt.*, 530 F. Supp. 2d at 864.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 864-5.

⁸¹ *Id.* at 866-7.

⁸² *Siesta Vill. Mkt.*, 530 F. Supp. 2d at 867.

⁸³ *Id.*

⁸⁴ *Id.* at 874.

Despite the plaintiffs' arguments that this provision too was unconstitutional, the court said out-of-state retailers are free now either to sell to Texas consumers through a Texas wholesaler or to apply for Texas wholesaler permits themselves through the TABC.⁸⁵ The court acknowledged that the Texas agency's requirements were not ideal, but "[t]he fact that the remaining constitutional components of the Texas regulatory scheme may be somewhat awkward when applied to out-of-state wine retailers does not require that the Texas Legislature enact a separate system that regulates them."⁸⁶

The court said the wholesaler requirement applies equally to Texas and out-of-state retailers.⁸⁷ The court stated that if an out-of-state retailer has a problem with Texas' complex three-tier system for wine wholesale and retail sales, it must take up the issue with the Texas Legislature.⁸⁸

The out-of-state retailers are planning to appeal the part of the ruling that would require them to buy wine from Texas wholesalers, but they otherwise were happy with the court's decision, according to media reports.⁸⁹ Tom Wark, executive director of the Specialty Wine Retailers Association, based in Sacramento, Calif., told the *Wall Street Journal* that the court decision may influence pending wine shipping legislation in several other states, including Maine, Tennessee and Virginia.⁹⁰ The ruling also could have major implications for interstate sales of beer and distilled spirits, and other consumer products.⁹¹ Furthermore, legal experts contend that several conflicting decisions around the country concerning alcohol retailers make the issue "ripe for resolution by the Supreme Court."⁹²

The issue of interstate wine sales is a hot one right now. Several additional lawsuits around the country are contesting other versions of allegedly discriminatory wine commerce laws.⁹³ Several

⁸⁵ *Id.* at 871.

⁸⁶ *Id.* at 869.

⁸⁷ *Siesta Vill. Mkt.*, 530 F. Supp. 2d at 870.

⁸⁸ *Id.* at 871.

⁸⁹ Kesmodel, *supra* note 4.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Lynn Marek, *Legal Battle Over Wine Shipments Has Ripened*, NAT'L L. J.,

of the other states' contested laws require a prospective wine purchaser to meet face-to-face with a winery representative on the seller's premises to order a wine shipment, making phone and Internet orders impossible.⁹⁴ Such laws require courts now to decide what to do "when a state law makes interstate commerce difficult, but not impossible," according to James Tanford, a professor at Indiana University School of Law-Bloomington, who is working with lawyers to challenge the laws.⁹⁵ Lawsuits of this sort currently are pending before the U.S. Courts of Appeals for the Second, Sixth and Seventh Circuits.⁹⁶ In the Indiana case pending before the Seventh Circuit, the Southern District of Indiana struck down Indiana's requirement that there be a face-to-face transaction prior to a wine shipment, but upheld other state restrictions on out-of-state wineries.⁹⁷

Some commentators think the courts are steering toward better evening the playing field for interstate wine competition, but others are not so sure.⁹⁸ "The courts are starting to understand *Granholm* and what it meant and what it didn't mean," according to Craig Wolf, an attorney representing wine wholesalers. "So far, the prevailing winds have been in favor of the states."⁹⁹

Jan. 21, 2008, at 6.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Baude v. Heath*, No. 07-03323 (7th Cir. argued Feb. 22, 2008).

⁹⁸ *Marek*, *supra* note 93.

⁹⁹ *Id.*