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CONSUMER NEWS

By Ryan Eddings*

Wine Lovers Win Battle, Could Lose War

Oenophiles in twenty-four states¹ won a major battle in their war to secure full access to all of America's 3,000-plus independent wineries² after the Supreme Court struck down state laws in New York and Michigan that discriminated between in-state and out-of-state wineries.³ The decision could potentially open new markets for small independent wineries, some of whom challenged the state laws in question. At the same time, the ruling could also provide consumers much broader variety of wines available at lower prices. However, the equal treatment that consumers and producers sought when challenging the laws might also completely shut them out of new markets altogether.

Over the past few years, small wineries joined with wine lovers to challenge state laws prohibiting the direct shipment of wine into certain states from out-of-state wineries. As the lawsuits worked themselves through the federal courts, a split developed among the federal appellate courts.⁴ The Supreme Court set out to resolve this split when it agreed to hear *Granholm v. Heald* late in 2004. This was a consolidated case challenging the constitutionality of direct

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¹ *Granholm v. Heald*, 125 S.Ct. 1885, 1893 (2005).

² Steve Forbes, *Fact and Comment*, FORBES MAG., Jan 10, 2005, at 23, available at 2005 WLNR 1066249.

³ Charles Lane, *Justices Reject Curbs on Wine Sales*, WASHINGTON POST, May 17, 2005, at A01.

⁴ See Scott F. Mascianica, *Why All the Wine-ing? The Wine Industry's Battle With States over the Direct Shipment Issue*, 17 LOY. CONSUMER L. REV. 91 (2004).

shipment laws in Michigan and New York.⁵

The state laws challenged by the wineries arose after Congress repealed Prohibition with the Twenty-First Amendment in 1933, which permits states to regulate both the sale and importation of alcohol within its borders.⁶ Most states implemented a three-tiered distribution system requiring wine to pass from manufacturer to distributor to retailer.⁷ However, recently some states, including New York and Michigan, have loosened those laws as they apply to in-state wineries.⁸ These states now allow in-state wineries to by-pass the three-tiered system altogether and sell their wine directly to consumers, while prohibiting out-of-state wineries from doing the same.⁹ As a result, in-state wineries can sell their wine for considerably cheaper than out-of-state wineries.¹⁰ Meanwhile, the consolidation that occurred among wine wholesalers over the past twenty years has meant that it is no longer economical for wholesalers to carry wine from small wineries, as their wine is

⁵ *Granholm*, 125 S.Ct. at 1891.

⁶ U.S. CONST. amend. XXI, § 2 (“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”).

⁷ *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 851 (7th Cir. 2000).

⁸ *Granholm*, 125 S.Ct. at 1893. Under the Michigan law, in-state wineries are eligible for a “wine maker” license that allows them to ship wine directly to Michigan residents. The cost of the license varies, but small wineries can purchase a license for around \$25. A similar-sized out of state winery can purchase an “outside seller of wine” license for \$300, but this license only gives the holder the ability to sell wine to a licensed wholesaler.

Under the New York law, in-state wineries may sell their wine directly to consumers. An out-of-state winery must sell its wine through the three-tiered system, unless the wine it is made from grapes, of which at least 75% were grown in the State of New York, or if the out-of-state winery becomes a licensed New York winery. To be a licensed New York winery, the out-of-state winery would have to establish “a branch factory, office or storeroom within the state of New York.”

⁹ *Id.* at 1892.

¹⁰ See Sandra Silfven, *High Court Decants Cases Over Direct Shipment of Wine in Michigan and New York*, DETROIT NEWS, Dec. 9, 2004, at A1 (three-tiered system increases price by 35%); See also Fred Tasker, *U.S. Supreme Court Will Decide Whether Wine Lovers in Florida and 23 Other States Can Buy Wine Through the Internet or 800 Numbers*, THE MIAMI HERALD, Feb. 10, 2005, at Sec. A (direct shipment of wine would reduce prices by up to 21%).

generally available only in a limited supply.¹¹ Accordingly, many smaller wineries turned to the internet to generate sales and took advantage of the highly efficient logistical systems created by private carriers such as Federal Express and the United Parcel Service to ship their product.¹² Now the small out-of-state wineries seek to open up even more markets by having laws that discriminate between in-state and out-of-state wineries declared unconstitutional.

In front of the Supreme Court, the states defended their laws by arguing that the Twenty-First Amendment granted states the power to discriminate against out-of-state liquors.¹³ The Court dismissed this argument and concluded that the purpose of the “Twenty-First Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use.”¹⁴ The Court went on to hold “[t]he Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time.”¹⁵ The Court further concluded that the State regulations ran afoul of the Commerce Clause of the United States Constitution.¹⁶ Under the Twenty-First Amendment, States may regulate the importation and sale of alcohol, but it must “treat liquor produced out of state the same as its domestic equivalent.”¹⁷ The Court found this discriminatory effect to be the fatal flaw of the New York and Michigan laws.¹⁸ Because the laws favored in-state wineries over out-

¹¹ Federal Trade Commission, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE, July 2003, p. 6., available at <http://www.ftc.gov/os/2003/07/winereport2.pdf> (“...to the extent that some smaller wineries may have problems getting wholesalers to carry their labels, those problems may reflect fixed costs that make it uneconomical for a wholesaler to carry lesser-known wines that are available only in small quantities.”)

¹² *Granholm*, 125 S.Ct. at 1892-93.

¹³ *Id.* at 1902.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ U.S. CONST. art. I, § 8 cl. 3 (granting Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The inverse of the Commerce Clause, often referred to as the Dormant Commerce Clause, has been interpreted to prohibit states from regulating interstate commerce.).

¹⁷ *Granholm*, 125 S.Ct. at 1905.

¹⁸ *Id.* (“The instant cases, in contrast, involve straightforward attempts to

of-state wineries, they ran contrary to the Commerce Clause and could find no shelter under the Twenty-First Amendment.¹⁹ The Court was also not persuaded by the states' argument that the laws were necessary to ensure compliance with their tax collection scheme and that the laws minimize the risk of minors purchasing alcohol over the internet, as such goals could be achieved without violating the Commerce Clause.²⁰

With the announcement of the Court's decision, some wine industry insiders and consumers assumed that the floodgates had been opened. W. Reed Foster, President of the Coalition for Free Trade and chairman emeritus of Ravenswood Winery, used a biblical analogy to express his pleasure with the decision: "In this David versus Goliath battle, the ruling is a triumph for America's wine farmers."²¹ Others called it a "historic day for the U.S. wine industry."²² And at least one wine wholesaler got in the mood and commented that as a result of the decision, "[t]he nation's wineries will be better able to satisfy consumer demand, wine lovers will have access to a broader selection of wines, and retailers and wholesalers will ultimately grow their business. . . ."²³

Though the Court's decision undoubtedly provides wine consumers everywhere with reason to celebrate, many will still have to celebrate with in-state wine or wine purchased through their state's three-tiered distribution system. The Court's ruling did nothing more than invalidate state laws which discriminate between in-state and

discriminate in favor of local producers.").

¹⁹ *Id.* at 1907 ("States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.").

²⁰ *Id.* at 1905-07.

²¹ Press Release, Coalition for Free Trade, *Family Wineries, Consumers Triumph in U.S. Supreme Court Ruling Supporting Wine Direct Shipping* (May 16, 2005), available at <http://www.coalitionforfreetrade.org/press.html> (The Coalition for Free Trade is a non-profit organization whose goal is to legalize the direct shipment of wine from out of state wineries to all states where it is currently prohibited.).

²² *Id.*

²³ *Id.*

out-of-state wineries. Indeed, the Court went so far as to point out that it was not declaring the three-tiered distribution system unconstitutional.²⁴ And while the victors are busy celebrating, some states, and the interest groups that supported them, are plotting their next move.

The Coalition for a Safe and Responsible Michigan, a self-described grassroots organization of concerned citizens that seek to protect their communities by promoting safe and responsible alcohol sales in Michigan, said that the Court's decision "reaffirmed Michigan's right to regulate the sale and distribution of alcohol within its borders."²⁵ Some wine wholesalers agreed that the decision reaffirmed the authority of the states to regulate the sale and distribution of alcohol.²⁶ These organizations will likely lobby state legislators to entirely repeal the direct shipment of wine. President and CEO of the Wine and Spirits Wholesalers of America, Juanita D. Duggan, hinted at just such a strategy when she painted the dilemma "as a choice between supporting face-to-face transactions by someone licensed to sell alcohol or opening up the floodgates."²⁷ Such efforts likely find inspiration in the way in which the New Jersey state legislature answered the same decision in 1994, when it completely prohibited the direct shipment of wine within the state, rather than allow out-of-state wineries to ship directly to its citizens.²⁸

Not all observers believe that states will completely outlaw the direct shipment of wine.²⁹ While wine wholesalers have a strong economic incentive to block all shipments, small in-state wineries that have built their business through the direct shipment of wine to in-state consumers have an interest in maintaining their ability to ship directly to consumers. Like out-of-state small-wineries, they may

²⁴ *Granholtz*, 125 S.Ct. at 1905 ("We have previously recognized that the three-tier system itself is "unquestionably legitimate." quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)).

²⁵ Press Release, Coalition for a Safe and Responsible Michigan, *Supreme Court: State to Decide Question of Internet Alcohol Sales* (May 16, 2005), available at http://www.safeandresponsible.org/csr_release_final_05_15_05.pdf.

²⁶ Press Release, Wine and Spirits Wholesalers of America, *States Must Treat In-State and Out-of-State Alcohol Producers the Same: Court Holds Three-Tier System: "Unquestionably Legitimate"* (May 16, 2005), available at <http://www.wswa.org/public/media/20050516.html>.

²⁷ Press Release, *supra* note 26.

²⁸ NJ stat § 33:1-28.1 (2005)

²⁹ Lane, *supra* note 3.

have difficulty persuading wholesalers to carry their product. More importantly, part of the impetus behind the laws allowing for the direct shipment of wine from in-state wineries was to foster domestic wine production.³⁰ Legislators might be reluctant to pass a law that could destroy the fledging industry that they previously cultivated.

Each state's decision on whether to allow the direct shipment of out-of-state wine holds significant ramifications for consumers. Consumers have unquestionably benefited from access to a wider range of products that have been made cheaper by passing through a more efficient distribution system. With the Court's decision in *Granholm*, wineries at the very least can now compete for customers on a more level playing field. Ideally, state legislatures can craft legislation that will further the state interests of tax collection and compliance with the drinking age without proscribing the ability of consumers to purchase wine from any winery around the country. Such a compromise would truly be reason to celebrate.

Court Ruling Allows Cable Firms to Restrict Access to their Networks

The broadband cable industry and the Bush administration scored a major victory over the summer when the Supreme Court ruled³¹ that broadband cable service is not a "telecommunications service."³² Though the ruling probably looks like nothing more than an exercise in semantics to the average user of broadband cable networks, the Court's decision will likely have significant ramifications in regards to the quality of broadband service offered and the price the consumer pays for it.

Broadband cable internet service transmits data at a much higher rate of speed than traditional dial-up internet service that uses a standard telephone line.³³ In the United States, there are two primary broadband internet services available to consumers: cable

³⁰ *Dickerson v. Bailey*, 336 F.3d 388, 402 (5th Cir. 2003) (legislative intent of statute permitting in-state direct shipment of wine was to "help the Texas wine industry.").

³¹ *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S.Ct. 2688 (2005).

³² Yuki Noguchi, *Cable Firms Don't Have to Share Networks, Court Rules*, WASHINGTON POST, June 28, 2005, at D01.

³³ *National Cable*, 125 S.Ct. at 2695.