

2005

Oral Arguments Heard: Consumers Anticipate Free Flow of Wine from Upcoming Supreme Court Decision

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Recommended Citation

Douglas C. Nelson *Oral Arguments Heard: Consumers Anticipate Free Flow of Wine from Upcoming Supreme Court Decision*, 17 Loy. Consumer L. Rev. 367 (2005).

Available at: <http://lawcommons.luc.edu/lclr/vol17/iss3/7>

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verdicts provide plaintiffs with leverage during settlement discussions which account for ninety-six percent of medical malpractice payouts.⁵² Still, with plaintiff's winning medical malpractice cases before a jury only twenty-seven percent of the time nationwide, it is difficult to believe that the U.S.' court system is slanted in their favor.⁵³

Furthermore, when a jury feels compelled to buck the trend by deciding for the plaintiff and granting a large verdict, the injury which the plaintiff suffered is likely to be severe and one that, if the plaintiff is still alive, he or she will never recover from.⁵⁴ Such a proposal strikes some trial lawyers as "unconscionable."⁵⁵

The movement to protect physicians, hospitals, and insurance companies from liability at the expense of the most seriously injured in our society is growing.⁵⁶ While lively debate may be just what is needed to fix what ails our healthcare system, consumers' interests are best served when political rhetoric is tuned out in favor of well-reasoned consideration of the economic and moral consequences of proposed reform.

Oral Arguments Heard: Consumers Anticipate Free Flow of Wine from Upcoming Supreme Court Decision

Presently, wine consumers in twenty-four states are, in effect, barred from purchasing wine from all but a fraction of America's

⁵² Hallinan, *supra* note 11, at A1.

⁵³ *Id.*

⁵⁴ See Boehm, *supra* note 17, 367-68 (arguing that there is little reason to believe that juries are not qualified to properly decide cases). "A 2000 survey sent to one thousand trial judges . . . revealed that: Judges have 'a high level of day-to-day confidence in [the jury] system' 'Only 1 percent of the judges who responded gave the jury system low marks' 'Overwhelmingly . . . judges said they had great faith in juries to solve complicated issues.'" *Id.*

⁵⁵ *Id.*

⁵⁶ Kevin Gfell, *The Constitutional and Economic Implications of a National Cap on Non-Economic Damages in Medical Malpractice Actions*, 37 IND. L. REV. 773, 809 (2004).

3,000 independent wineries.⁵⁷ It is illegal for consumers in these states to purchase wine in California, for instance, and have it shipped directly their homes.⁵⁸ These twenty-four states⁵⁹ require out-of-state wineries, but not their in-state counterparts, to sell their product through in-state distribution channels which handle only a small portion of the nation's wines,⁶⁰ and which considerably mark up the prices consumers pay.⁶¹

The Constitution's dormant Commerce Clause ordinarily prohibits states from discriminating against interstate commerce.⁶² But on December 7, 2004, attorneys representing the states of New York and Michigan argued before the Supreme Court that the Twenty-First Amendment to the Constitution, the same Amendment that ended Prohibition, reserves special regulatory power to the states with regard to the sale of alcohol within state boundaries.⁶³ The states' argument is grounded on the notion that states should be able

⁵⁷ Steve Forbes, *Fact and Comment*, FORBES MAG., Jan. 10, 2005, at 23, available at 2005 WLNR 1066249.

⁵⁸ *Id.*

⁵⁹ See THE WINE INSTITUTE, at http://www.wineinstitute.org/shipwine/shipping_carriers/who_ships_where.htm (listing the states that restrict interstate shipments of wine and categorizing states according to the extent of the restriction) (last visited March 13, 2005). Direct interstate shipments are prohibited in the following states: Alabama, Arkansas, Connecticut, Delaware, Florida, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah and Vermont. *Id.*

⁶⁰ Forbes, *supra* note 57, at 23; 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 (quoting a Florida wine drinker's reaction to the prospect of getting a 1994 Chateau Pontet-Canet Bordeaux for \$30 dollars, plus \$12 shipping: "That's a hell of a deal. Not just the price, but it's also an older vintage, ready to drink. You can't beat that locally at any price.").

⁶¹ Sandra Silfven, *High Court Decants Cases Over Direct Shipment of Wine in Michigan and New York*, DETROIT NEWS, Dec. 9, 2004, at A1 (estimating that this distribution channel increased the price consumers pay by 35%); see also Tasker, *supra* note 60, at Sec. A (estimating that the free flow of wine through direct shipments to consumers would reduce prices by up to 21%).

⁶² 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) (explaining and analyzing the clash between the dormant Commerce Clause and the Twenty-First Amendment).

⁶³ Silfven, *supra* note 61, at A1.

to protect their citizens from the abuses of alcohol and therefore should have virtually unlimited power to control the sale of alcohol within their borders.⁶⁴ At first blush, the possibility that teenagers may use the Internet to order a crate of assorted wines for home delivery may give the states' argument some force.

Reports from those who witnessed the oral argument in the consolidated cases of *Granholtz v. Heald* and *Swedenburg v. Kelly*, however, suggest that the Justices were not impressed the states' argument.⁶⁵ The Court noted that preventing out-of-state sellers from shipping alcohol directly to consumers did nothing to prevent in-state sellers from doing the very same thing.⁶⁶ When attorneys for the states' admitted that the states could not prevent "one-hundred percent" of sales to minors, Justice Scalia shot back, "You can't prevent it at all."⁶⁷

The reaction from the bench was similar when Caitlain Halligan, arguing for New York, claimed that a law requiring wine sellers to have a physical presence in New York was justified by the state's need to oversee its alcohol trade by entering the wholesaler's premises to ensure that sales are properly reported.⁶⁸ To this, Justice Souter asked Halligan if she could show that New York had been making such inspections.⁶⁹ When she conceded that she could not, Justice Souter replied, "[w]ell, isn't that the end of that issue, then . . . I mean, it is your burden, isn't it?"⁷⁰

Conversely, Clint Bolick, opening for the wineries, seemed to fair better as he called the present system a "distributors' oligopoly"

⁶⁴ *Id.*; but see Forbes, *supra* note 57, at 23 (quoting Clint Bolick of the Institute for Justice who argues that present state laws do little to protect state citizens who are at the greatest risk, namely teens: "Teenagers . . . can find far less cumbersome ways (to get wine) than locating an appropriate Web site, producing adult identification at the time of purchase, waiting an unspecified period of time for delivery of a parcel marked 'Alcohol: Adult Identification Required,' arranging to accept delivery when a parent is not home and, at that time, producing adult identification once again.").

⁶⁵ Tony Mauro, *In Vintner Veritas*, 2/2005 CORP. COUNS. 95 (2005).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ UNITED STATES SUPREME COURT, *at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-1116.pdf (last visited March 13, 2005).

⁶⁹ *Id.*

⁷⁰ *Id.*

which accomplished only “economic protectionism.”⁷¹ Then, former Stanford Law School Dean Kathleen Sullivan, who also argued for the wineries, seemed to score points in an exchange with Justice Ginsburg. Justice Ginsburg asked if it was the wineries position that states could ban direct sales to its citizens from out-of-state wineries if they also banned direct sales from their in-state competitors.⁷² Sullivan responded in a way that both narrowed the issue and utilized Justice Ginsburg own reasoning, “That’s exactly correct . . . As you’ve said in the context of gender discrimination, you can cure an equal protection problem by leveling up or leveling down.”⁷³

After witnessing the oral arguments, James Seff, who wrote a brief in the case for the Wine Institute, which represents eight-hundred wineries, said, “I am thrilled [with] the way it unfolded At the end of the day, I think the antidiscrimination notions of the dormant [c]ommerce [c]lause outweighed the jurisprudence of the Twenty-[f]irst Amendment.”⁷⁴

A ruling in favor of the wineries would not only allow smaller wineries to sell to previously unreachable markets, but it would also allow big discount retailers of wine to ship a variety of brands nationwide.⁷⁵ The latter proposition may ultimately have a greater impact on the market as a whole.⁷⁶ Internet sales of wine presently account for less than two percent of the \$18.2 billion U.S. domestic market, but this percentage is expected to skyrocket if the Supreme Court rules in favor of the wineries.⁷⁷

Given the sophistication and the passion that many wine consumers have for their product, and given that each vintage is unique and of limited supply, a consumer victory over a stifling state-sponsored distribution system would indeed be sweet. And for consumers with less sophisticated palates, well, we can appreciate paying less for the wine we drink if the Supreme Court rules as expected.

⁷¹ Mauro, *supra* note 65, at 95.

⁷² Tony Mauro, *Stanford ‘Babe’ Joins Fight for Freer-Flowing Wine Market*, 2005 SAN FRANCISCO RECORDER 3 (2005).

⁷³ *Id.*

⁷⁴ Mauro, *supra* note 65, at 95.

⁷⁵ Tasker, *supra* note 60, at Sec. A.

⁷⁶ *See id.* (reporting that 50 of the nations’ 3,000 wineries account for 90% of domestic sales).

⁷⁷ *Id.*