

In the First District Court of Appeal
State of Florida

Case No.: 1D18-3549
L.T. Case No.: 2018-026761

The Wine and Spirits Distributors of Florida, Inc.; Florida
Independent Spirits Association; the Florida Beer Wholesalers
Association, Inc.; and the Beer Industry of Florida, Inc.,

Appellants,

v.

Arnold's Wines, Inc., d/b/a Kahn's Fine Wines and Spirits; and
Florida Department of Business and Professional Regulation, Division
of Alcoholic Beverages and Tobacco,

Appellees.

An Appeal of a Declaratory Statement

**Appellee Department of Business and Professional Regulation, Division of
Alcoholic Beverages and Tobacco's Answer Brief**

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Introduction

This is an appeal from a declaratory statement which expressed an administrative agency's opinion about the applicability of certain Florida statutes to an out-of-state retailer of wine. The declaratory statement is an appealable final agency action. *See* §§ 120.565(3), 120.68(1)(a), Fla. Stat. (2018). The issues on appeal are: a) whether the administrative agency should have even accepted the petition for declaratory statement in the first place, i.e., whether the petition complied with the requirements of statute and rule; b) whether the administrative agency properly expressed its opinion in its declaratory statement as to the applicability of Florida statutes to out-of-state producers and vendors of wine; and c) whether the administrative agency correctly interpreted a case that involved the exact same issue and applied the same set of Florida statutes.

Preliminary Statement Regarding Citations and Terms

In this answer brief, citations to the record on appeal are designated as "R" followed by the appropriate page number(s), e.g., (R. 100). Likewise, citations to the Appellant's initial brief are designated as "IB" followed by the appropriate page number(s), e.g., (IB. 100). The term "Beverage Law" refers to chapters 561, 562, 563, 564, 565, 567, and 568, Florida Statutes. *See* § 561.01(6), Fla. Stat. (2018).

Statement of the Case and Facts

This appeal arises from a petition for declaratory statement (or “petition”) filed with the Appellee, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (“Department”). (*See* R. 1). In its petition, the Appellee, Arnold’s Wines, Inc., d/b/a Kahn’s Fine Wine and Spirits (“Appellee-Petitioner”), asked the Department to issue a declaratory statement about the applicability of portions of Florida’s Beverage Law to out-of-state retailers of wine such as itself. (*See* *Id.*) The Appellants, Wine and Spirits Distributors of Florida, Florida Independent Spirits Association, the Florida Beer Wholesalers Association, Inc., and the Beer Industry of Florida, Inc., motioned the Department to intervene in the underlying proceedings. (*See* R. 4-43; 44-84.) They were ultimately permitted to intervene. (*See* R. 89.) The Appellants’ statement of the case and facts is overly argumentative so the Department offers the following to aid the Court in its review.

The Petitioner and Declaratory Statement

The Appellee-Petitioner is an out-of-state retailer which wants to “sell, ship, and deliver [its] wines to consumers in the [S]tate of Florida, using either their own vehicles or a common carrier.” (*See* R. 1.) In its petition, the Appellee-Petitioner asked the Department to opine “whether an out-of-state retailer [such as itself] can

sell, ship, and deliver wine directly to consumers in the State of Florida, either by using its own vehicle or by common carrier.” (*See Id.*)

In its declaratory statement, the Department offered its opinion as to the applicability of sections 561.54 and 561.545, Florida Statutes, in light of *Bainbridge v. Turner*, No. 8:99-CV-2681-T-27TBM (M.D. Fla. 2005). (*See R.* 88.) Specifically, the Department concluded

The applicability of sections 561.54 and 561.545, Florida Statutes, to out-of-state wine producers and wine vendors is settled. *See Bainbridge v. Turner*, No. 8:99-CV-2697-T-27TBM (M.D. Fla. 2005) (enjoining the Division from enforcing section[s] 561.54 and 561.545, Florida Statutes, against out of state manufacturers and vendors of wine). The Division abides by the terms of the order entered in *Bainbridge*, and the [Appellee-Petitioner’s] inquiry is answered accordingly.

(*See Id.*) The Appellants filed a timely notice of appeal of the declaratory statement to this Court. (*See R.* 92-93.)

Summary of the Argument

This Court should affirm the Department’s declaratory statement. In short, the petition for declaratory statement complied with the requirements of statute and rule, the Department cannot ignore the district court’s order in *Bainbridge*, and the Department correctly pointed to the district court’s order in *Bainbridge* as it applies to the Appellee-Petitioner’s particular circumstances.

The Appellee-Petitioners filed an acceptable petition for declaratory statement. The requirements for such a petition are found in section 120.565,

Florida Statutes, and in rule 28-105.002, Florida Administrative Code. The Appellee-Petitioner complied with those requirements. As such, the Appellee-Petitioner filed an acceptable petition for a declaratory statement.

The Department was asked how sections 561.54 and 561.545, Florida Statutes, would impact an out-of-state retailer of wine that wanted to sell, ship, and deliver wine directly to consumers in the State of Florida. Refusing to answer would serve no logical end. Plus, this question has already been answered by the courts. Specifically, the United States District Court for the Middle District of Florida, issued an order in the *Bainbridge* case which held that sections 561.54 and 561.545, Florida Statutes, violate the Federal Constitution's Commerce Clause and enjoined the Department from enforcing those statutes "against out-of-state vendors and producers" of wine. The Department said as much in its declaratory statement in this case. To do otherwise would be illogical and only give an incomplete or misleading answer.

The language of the district court's order in *Bainbridge* is clear: sections 561.54 and 561.545, Florida Statutes, violate the Federal Constitution's Commerce Clause and the Department cannot enforce those provisions "against out-of-state vendors and producers" of wine. Therefore, the Department was right to point to *Bainbridge* in its declaratory statement since it not only constrains the Department's actions but also answers the Appellee-Petitioner's question.

Argument

I. The Department's declaratory statement should be affirmed.

Standard of Review

Previously, an appellate court could only reverse a declaratory statement if the administrative agency's interpretation of the law was clearly erroneous. *See Thrivent Fin. for Lutherans v. Dep't of Fin. Servs.*, 145 So. 3d 178, 181 (Fla. 1st DCA 2014). The Florida Constitution, however, was recently amended and now courts are prohibited from deferring to an administrative agency's interpretation of the laws it enforces. *See* Art. V, § 21, Fla. Const. Accordingly, the standard of review in this case is now de novo. *See Id.*

A. The petition for declaratory statement complied with the requirements of statute and rule.

Section 120.565, Florida Statutes, and rule 28-105.002, Florida Administrative Code, establish the requirements for a petition for declaratory statement. As an initial matter, “[a]ny substantially affected person may seek a declaratory statement regarding an agency’s opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner’s particular set of circumstances.” § 120.565(1), Fla. Stat. (2018). “The petition seeking a declaratory statement shall state with particularity the petitioner’s set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.”

§120.565(2), Fla. Stat. (2018). Rule 28-105.002, Florida Administrative Code, prescribes the specific manner in which a petition for declaratory statement must be composed.

The Appellee-Petitioner's petition for declaratory statement satisfies the requirements of section 120.565, Florida Statutes, and rule 28-105.002, Florida Administrative Code. First, the Appellee-Petitioner is asking for the Department's opinion how sections 561.54 and 561.545, Florida Statutes, apply to their particular set of circumstances. The Appellee-Petitioner is a substantially affected entity. The Department is charged with enforcing these statutory provisions. Therefore, the Appellee-Petitioner petitioned the correct administrative agency and correctly identified the applicable statutes that it thinks apply to its particular set of circumstances. Second, the Appellee-Petitioner describes itself as an out-of-state retailer of wine that is interested in selling, shipping, and delivering wines directly to consumers in the State of Florida. In other words, the Appellee-Petitioner has described its particular set of circumstances in its petition for declaratory statement. Third, the Appellee-Petitioner complied with the requirements of rule 28-105.002, Florida Administrative Code. Specifically, the petition: a) contained the correct caption; b) listed the required details of the petitioner; c) listed the required details of the petitioner's attorney or qualified representative; d) included reference to statutory provisions the Department enforces; e) described how those

same statutory provisions could impact the Appellee-Petitioner's set of circumstances; and f) was signed and dated. Overall, the Appellee-Petitioner filed an acceptable petition for declaratory statement.

The Appellants' challenges to the sufficiency of the Appellee-Petitioner's petition for declaratory statement miss the mark. To prevail on this issue, the Appellants must show that the fairness of the proceedings was marred by a material error in procedure or a failure to follow the correct procedure. *See* § 120.68(7)(c), Fla. Stat. (2018). The Appellants cannot. Instead, the Appellants argue that the Department has impermissibly announced a broad agency policy. *See* IB. 8-9. This argument is based on the premise that the Appellee-Petitioner did not adequately describe its particular set of circumstances such that the Department may have unwittingly thrown the entirety of the Beverage Law itself into confusion. *See* IB. 9.

The premise of the Appellant's main argument is flawed. It is flawed because the Appellee-Petitioner adequately described itself as an out-of-state retailer of wine that was interested in selling, shipping, and delivering wines directly to consumers in the State of Florida. The ultimate question posed by the Appellee-Petitioner did not require a more detailed set of circumstances than that. Furthermore, any implication that the Department's declaratory statement is faulty simply because it could impact more than just the Appellee-Petitioner is incorrect

as a matter of law. *See e.g. Chiles v. Dep't of State, Div. of Elections*, 711 So. 2d 151, 154 (Fla. 1st DCA 1998) (“A declaratory statement is not transformed into a rule merely because it addresses a matter of interest to more than one person.”) Likewise, the Appellants’ argument that they were not given adequate notice of the potential impact of *Bainbridge* falls flat. The Appellants were already on notice of the *Bainbridge* decision – at least two of the Appellants sought leave to intervene in *Bainbridge* while it was still pending at the Middle District. Therefore, the Appellants have failed to demonstrate any fatal, material error in procedure or failure to follow prescribed procedure.

B. The declaratory statement properly expressed the Department’s opinion as to the applicability of Florida statutes to out-of-state wineries and vendors.

Florida’s Beverage Law unquestionably applies to this case. The Division of Alcoholic Beverages and Tobacco (“Division”) was created to supervise the conduct, management, and operation of the manufacturing, packaging, distribution, and sale within the state of all alcoholic beverages. *See* § 561.02, Fla. Stat. (2018). The Division must enforce the provisions of the Beverage Law. *See* § 561.08, Fla. Stat. (2018). The Legislature also granted the Division the authority to adopt rules to implement the provisions of the Beverage Law. *See* § 561.11(1), Fla. Stat. (2018).

The Beverage Law is the comprehensive framework created by the Legislature to regulate the manufacturing, distribution and sale of alcoholic beverages, including shipments and deliveries of alcoholic beverages both from within and from outside of the state. As it is written, the Beverage Law prohibits out-of-state manufacturers or suppliers of alcoholic beverages from delivering alcoholic beverages directly to consumers in the State of Florida. *See* § 561.54, Fla. Stat. (2018). Likewise, out-of-state manufacturers or suppliers of alcoholic beverages are prohibited from shipping alcoholic beverages to any person in the State of Florida except duly licensed entities or state-bonded warehouses. *See* § 561.545, Fla. Stat. (2018). At the same time, however, the Beverage Law permits in-state wineries to simultaneously manufacture *and* sell wine directly to consumers in this state under certain conditions. *See* § 561.221(1)(a), Fla. Stat. (2018).

In *Granholm v. Heald*, 544 U.S. 460 (2005), the United States Supreme Court held that two states' statutory schemes which prohibited out-of-state wineries from directly shipping wine to consumers, while simultaneously authorizing in-state wineries to do so, violated the Federal Constitution's Commerce Clause. *See* 544 U.S. at 493. In *Bainbridge*, the Middle District, citing to *Granholm*, issued an order which held that sections 561.54 and 561.545, Florida Statutes, violate the Commerce Clause and enjoined the Department from

enforcing those statutes “against out-of-state vendors and producers” of wine. (*See* R. 389-390.)

The Department cannot ignore the Appellee-Petitioner’s petition and it cannot ignore the district court’s order in *Bainbridge*. In this case, the Appellee-Petitioner wanted to know how the Department would apply sections 561.54 and 561.545, Florida Statutes, to its particular set of circumstances. The Appellee-Petitioner’s filed an acceptable petition. Therefore, refusing to answer the Appellee-Petitioner’s petition would thwart the purposes of a declaratory statement and serve no logical end. *See ExxonMobil Oil Corp. v. Dep’t of Agric. & Consumer Servs.*, 50 So. 3d 755, 758 (Fla. 1st DCA 2010). Likewise, ignoring the district court’s order in *Bainbridge* would also serve no logical end. Since it directly enjoins the Department from enforcing sections 561.54 and 561.545, Florida Statutes, “against out-of-state vendors and producers” of wine, the district court’s order in *Bainbridge* must be included in the Department’s analysis of those statutory provisions’ impacts on the Appellee-Petitioner.

To do otherwise would be illogical. For instance, if the Department ignored the district court’s order in *Bainbridge* and issued a declaratory statement that solely relied on the Beverage Law as it is written, the Department would give an incomplete or even misleading answer to questions regarding the applicability of sections 561.54 and 561.545, Florida Statutes, to out-of-state vendors and

producers of wine and only create confusion. Such a confusing answer is at odds with the purposes of the declaratory statement.

The Appellants want the Department to bury its head in the sand and ignore the purpose of a declaratory statement. Relying on a narrow reading of the language of the section 120.565, Florida Statutes, and rule 28-105.001, Florida Administrative Code, the Appellants argue that the Department cannot consider the implications of the district court's order in *Bainbridge*, or, by extension, the larger holding in *Granholm*, in its declaratory statement. *See* IB. 11-14. In doing so, the Appellants ignore the overall purpose of a declaratory statement. "The purpose of a declaratory statement is to resolve a controversy or answer questions concerning the applicability of statutes, rules, or orders which an administrative agency enforces, adopts or enters." *Citizens of the State ex rel. Office of Pub. Counsel v. Fla. Pub. Serv. Comm'n*, 164 So. 3d 58, 60 (Fla. 1st DCA 2015). Furthermore, declaratory statements "enable members of the public to definitively resolve ambiguities of law arising in the conduct of their daily affairs or in the planning of their future affairs" and "enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts." *See* Id. at 62 (*quoting* Patricia A. Dore, *Access to Florida Administrative Proceedings*, 13 Fla. St. U. L. Rev. 965, 1052 (1986)).

The Department's declaratory statement is in line with these principles. It answers the Appellee-Petitioner's question regarding the applicability of sections 561.54 and 561.545, Florida Statutes, in light of the district court's order in *Bainbridge*. A declaratory statement that ignored the court's order in *Bainbridge*, or the broader holding of *Granholm*, would be out of line with these principles because it would provide an incomplete or misleading answer. Accordingly, the Appellants' narrower focus should be overridden by the broader purposes of a declaratory statement. Therefore, the Department was right to include *Bainbridge* in its declaratory statement.

C. The Department correctly interpreted the district court's order in *Bainbridge*.

The district court's order in *Bainbridge* plainly states how the Federal Constitution's Commerce Clause impacts the Department's enforcement of sections 561.54 and 561.545, Florida Statutes – it renders them unenforceable. Specifically, the Department cannot enforce those provisions against “out-of-state vendors and producers” of wine. (*See* R. 390) (emphasis added.) This means the Department was correct to point the Appellee-Petitioner, an out-of-state retailer of wine, to the district court's order in *Bainbridge* and state that “[t]he applicability of sections 561.54 and 561.545, Florida Statutes, to out-of-state wine producers and wine vendors is settled.” (*See* R. 88) (emphasis added.) The Appellants' arguments to the contrary are untenable.

The Appellants argue that the Department’s reading of the district court’s order in *Bainbridge* is incorrect because it miscomprehends the meaning of the district court judge’s phrase “out-of-state vendors and producers.” *See* IB. 14-21. To get there, the Appellants argue that the phrase “out-of-state vendors and producers” cannot describe vendors of wine and producers of wine. *See* IB. 20-21. Instead, the Appellants argue that the phrase “out-of-state vendors and producers” actually means “out-of-state wineries who are similarly situated to wineries-turned-vendors in Florida that have the ability to delivery directly to consumers.” *See* IB. 20. The Appellants reach this conclusion by mistakenly drawing the wrong conclusions from a comparison of an earlier opinion of the United States 11th Circuit Court of Appeal to a latter, two page order of a district court judge.

This issue arose to the 11th Circuit in 2002 after the Middle District originally entered summary judgment in favor of the Division. *See Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002). The 11th Circuit succinctly described the issue before it as “whether the State of Florida may prohibit out-of-state wineries from shipping their products directly to Florida consumers while permitting in-state wineries to do so.” *See* *Id.* at 1106 (emphasis added). The 11th Circuit described Florida’s regulatory scheme as a three-tier distribution system which resembled a vertical quarantine. *See* *Id.* The 11th Circuit also recognized that section 561.221(1)(a), Florida Statutes, permitted some in-state wineries to be

licensed as a “vertically integrated winery/retailer.” *See Id.* at 1106. The 11th Circuit also used the term “winery-turned-vendor” in a footnote as part of its broader discussion whether a vendor could make deliveries using a common carrier. *See Id.* at 1107 n.6. For the majority of its opinion, however, the 11th Circuit simply referred to “in-state wineries” and “out-of-state wineries.” *See Id.* at 1104-1110; 1115-1116. The 11th Circuit never explicitly tied the term “winery” to any specific class of license or to a combination thereof. In the end, the 11th Circuit reversed the summary judgment and remanded the case back to the Middle District for further fact-finding. *See Id.* at 1116.

Nothing about the 11th Circuit’s discussion of the underlying issues in this case impacts the ordinary meaning of the phrase “out-of-state vendors and producers” as used by the district court judge in his two page order. The district court’s order does not use the term “winery-turned-vendor” or “vertically integrated winery/retailer.” It uses the terms “in-state wineries” and “out-of-state wineries” when it describes the ultimate holding of *Granholm*. (*See R.* 389.) The 11th Circuit’s terminology does not come into play when analyzing the district court’s order. In fact, when the district court addresses this case, it uses the phrase “vendors and producers” instead. (*See R.* 390.)

“Wineries” and “vendors and producers” of wine are used differently by the district court. The district court ultimately held that sections 561.54 and 561.545,

Florida Statutes, violate the Commerce Clause to the extent they prohibit “out-of-state wineries” from selling and delivering wine directly to consumers while simultaneously permitting “in-state wineries” to do so. (*See* R. 390.) It also enjoined the Department from enforcing sections 561.54 and 561.545, Florida Statutes, against “out-of-state vendors and producers” of wine. (*See* R. 390.) The district court would not have specifically enjoined the Department from enforcing sections 561.54 and 561.545, Florida Statutes, against “out-of-state vendors and producers” of wine if it thought such proscription was covered by its other conclusion regarding “in-state and out-of-state wineries”. In other words, if the district court thought that “producers and vendors” of wine meant the same thing as “in-state or out-of-state wineries,” it would have written its order differently. These terms must have different meanings because the district court chose to enjoin the Department against enforcing those statutes against “out-of-state vendors and producers” of wine and not simply against “in-state or out-of-state wineries.” Therefore, the Department was right to cite in its declaratory statement to the district court’s order in *Bainbridge* since it controls the Department’s analysis of how sections 561.54 and 561.545, Florida Statutes, impacted the Appellee-Petitioner as an out-of-state retailer of wine.

Conclusion

Based on the foregoing argument and citation to authority that demonstrates why the *Bainbridge* case is dispositive, the Appellee, Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco, respectfully requests that this Court affirm its declaratory statement.

Respectfully submitted this 18th day of February, 2019.

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing answer brief has been served via electronic mail on counsel for Appellant, Donna E. Blanton and Brittany A. Long, Radey Law Firm, 301 South Bronough Street, Suite 200, Tallahassee, Florida 32301, at dblanton@radeylaw.com and balong@radeylaw.com on this 18th day of February, 2019.

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Certificate of Compliance

I hereby certify that the foregoing answer brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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