

Retailer Wine Shipping and the Courts

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Goals of litigation

Goals of Litigation

- ▶ To overturn discriminatory state laws
- ▶ Bring in new arguments to each case
- ▶ Provide a challenge to legal doctrines influencing cases
- ▶ Provide more favorable legal arguments
- ▶ Force judges to look at these cases more expansively
- ▶ Shine a light on bad legal precedent

Goals of Litigation

- ▶ Demonstrate where precedent strengthens our position
- ▶ Create a circuit split, which will cause legal havoc in the system
- ▶ Obtain cert from the U.S. Supreme Court
- ▶ Influence the court to render a decision overturning discriminatory state liquor laws
- ▶ Once and for all obtain a decision that opens up markets

Wine retailer shipping cases

Key Moments

KEY MOMENTS 1:

Tennessee Wine and Spirits Retailers Association
v.
Thomas

Tennessee Wine important principles

- ▶ The nondiscrimination principle in *Granholm* extends beyond producers to retailers
- ▶ Direct shipping laws contradict the dormant Commerce Clause because they deprive citizens of their right to have market access to other states on equal terms
- ▶ A discriminatory law can only be sustained if it is narrowly tailored to advance a legitimate local purpose
- ▶ Mere speculation and unsupported assertions are not enough to sustain laws that discriminate

Tennessee Wine important principles

- ▶ There must be concrete evidence supporting discriminatory laws
- ▶ The state must demonstrate that nondiscriminatory alternatives were not available
- ▶ Any discriminatory law under the auspice of the 21st Amendment faces strict scrutiny and a rigorous constitutional review

KEY MOMENTS 2:

Lebamoff v. Whitmer

Wine Retailer Shipping Cases

- ▶ *Lebamoff v. Whitmer*, a 6th Circuit decision reversing a lower court decision finding Michigan's wine retailer shipping laws unconstitutional
- ▶ This decision was driven by the Judge's view that allowing product shipped from out-of-state retailers would impact temperance
- ▶ This decision also was influenced by the judge's view that a state would be required allow retailers to do business in a state and not need to adhere to the state specific laws

Wine Retailer Shipping Cases

Problems with the 6th Circuit's decisions

- ▶ *Tennessee Wine* requires evidence and not unsupported assertions for justifying discrimination
- ▶ Evidence justifying discrimination was not presented
- ▶ The standard of review in 21st Amendment/Commerce Clause cases is strict scrutiny
- ▶ Strict scrutiny was not applied

Wine Retailer Shipping Cases

Problems with the 6th Circuit's decision

- ▶ The three-tier system being unquestionably legitimate justifies setting up a system to control alcohol
- ▶ The unquestionably legitimate doctrine is not a central tenet of constitutional analysis
- ▶ A legitimate interest in maintaining temperance and controlling the distribution of alcohol are enough to justify discrimination. It's an unsupported assertion

Wine Retailer Shipping Cases

- ▶ The *Whitmer* decision envisions a world where the border is tightly sealed for liquor regulatory purposes
- ▶ Yet out-of-state wineries have shipped from other states for over 15 years
- ▶ Challenges to Ohio and Kentucky's discriminatory wine retailer shipping laws are impacted by this decision
- ▶ Will a different 6th Circuit panel follow *Whitmer* or disagree with it

Wine Retailer Shipping Cases

- ▶ A federal district judge in the Kentucky case, *Tannins of Indianapolis v. Taylor*, dismissed the retailer's challenge based on the *Whitmer* decision
- ▶ In the Ohio case, *Block v. Canepa*, the federal judge rejected the state's motion to dismiss the case
- ▶ Obviously, we have divergent views
- ▶ The Ohio judge needed additional evidence to properly rule

KEY MOMENTS 3:

Sarasota Wine Market v. Schmitt

Wine Retailer Shipping Cases

- ▶ *Sarasota Wine Market, LLC v. Schmitt*, No. 19-1948 (8th Circuit 2021)
- ▶ The decision at the district court denied the retailer's challenge because the state was permitted to discriminate against retailers
- ▶ The previous 8th Circuit decision held that *Granholm* only applied to producers
- ▶ *Tennessee Wine* made the main legal basis for this decision irrelevant

Wine Retailer Shipping Cases

- ▶ The panel in this case still ruled for the state
- ▶ This decision was driven by the Judge's view that the three-tier system is unquestionably legitimate and a state can determine how products would be funneled through a three-tier system
- ▶ Which includes requiring a physical presence to protect the system
- ▶ Distinguished from *Tennessee Wine* because *Tennessee Wine* involved a durational residency requirement that's not essential to the three-tier system

Wine Retailer Shipping Cases

Problems with 8th Circuit decisions

- ▶ These decisions held to the principle that *Tennessee Wine* was a very narrow decision
- ▶ The three-tier system being unquestionably legitimate doctrine gives the state carte blanche regulatory power
- ▶ There is no strict scrutiny test applied

Wine Retailer Shipping Cases

Problems with the 8th Circuit's decisions

- ▶ The state did not need to provide evidence for why discrimination was necessary
- ▶ The state did not produce a reasonable nondiscriminatory alternative in lieu of discrimination
- ▶ The Commerce Clause analysis from *Tennessee Wine* was not applied

Wine Retailer Shipping Cases

Other Important Cases

- ▶ *Lebamoff v. O'Connell*, Illinois case on remand from the 7th Circuit
- ▶ The 7th Circuit reversed and remanded this case and requires a fully developed record and issues be vetted by the lower court
- ▶ The opinion went to great lengths to rip apart Illinois' law as protectionist and discriminatory

Wine Retailer Shipping Cases

Case Status

- ▶ *Anvar v. Tanner, 1:19-cv-00523* (Rhode Island)
- ▶ Survived a motion to dismiss for summary judgment
- ▶ State claimed plaintiff lacked standing because they never tried to order product
- ▶ Federal district court denied the state's claim
- ▶ Cross motions for summary judgment filed

Wine Retailer Shipping Cases

Case Status

- ▶ *Jean-Paul Weg v. Graziano*, 2:19-cv-14716 (New Jersey)
- ▶ New plaintiff in this case
- ▶ The case is in federal district court
- ▶ New Jersey is taking a hard line on DTC shipping
- ▶ Even with a win in district court, there is going to be a relentless fight

Wine Retailer Shipping Cases

Case Status

Pair of Sixth Circuit cases

- ▶ Challenging *Lebamoff v. Whitmer* decision
- ▶ *Tannins of Indianapolis v. Taylor* (Kentucky case)
- ▶ Original decision in favor of the state based on *Lebamoff*
- ▶ Motion to reconsider filed, plaintiff dropped out, case is dead, looking for a new plaintiff to refile

Wine Retailer Shipping Cases

Case Status

- ▶ *Block v. Canepa*-Ohio case challenging discriminatory wine retailer shipping law
- ▶ Unlike the Kentucky case, the judge did not dismiss it out-of-hand
- ▶ Requiring that the state and retailer build a record
- ▶ The judge will rule on the record, we will see the deference he gives to *Lebamoff v. Whitmer*

Wine Retailer Shipping Cases

Case Status

- ▶ *Freehan v. Berg*-Challenges Illinois' wine retailer shipping law
- ▶ Original case was reversed and remanded from the 7th Circuit, *Lebamoff v. O'Connell*
- ▶ Originally filed case was dismissed because plaintiff, Lebamoff sold its business
- ▶ New complaint filed, the judge is ruling on motion to change venue

Wine Retailer Shipping Cases

Case Status

- ▶ *Thewinetobuy.com v. Cocca* -Challenges Arizona's wine retailer shipping law
- ▶ First case filed in the 9th Circuit
- ▶ Discovery cut off is May 6th, and summary judgement motions due June 10, 2022

Wine Retailer Shipping Cases

Case Status

- ▶ Florida case challenges not wine retailer shipping laws, but the legal right to ship
- ▶ *Bainbridge v. Whisenhunt*, CASE NO. 8:99-cv-2681-JDW-TBM
- ▶ After *Granholm*, a Florida judge ruled that Florida's ban on shipping was unconstitutional
- ▶ The judge's injunction precluded Florida from enforcing this law

Wine Retailer Shipping Cases

Case Status

- ▶ Since the statute did not distinguish between retailers and producers, Florida could not enforce its laws against retailers
- ▶ In 2018 a Declaratory Statement from Florida confirmed that out-of-state retailers could ship wine into the state
- ▶ Florida concluded the issue was settled by a prior decision permitting wine retailer shipping

Wine Retailer Shipping Cases

Case Status

- ▶ Wholesalers are challenging an injunction issued 17 years ago
- ▶ The same judge denied their request to revisit the injunction
- ▶ This case doesn't contest the constitutionality of a wine retailer shipping law, but the legal permissibility of an injunction

Wine Retailer Shipping Cases

Oral Argument Cases

Chicago Wine Company v. Holcomb

- ▶ Challenge to Indiana's wine retailer delivery law
- ▶ The law allows Indiana retailers to deliver but does not afford this same privilege to out-of-state retailers

Wine Retailer Shipping Cases

Oral Argument Cases

- ▶ Indiana does not allow in-state retailer shipping
- ▶ The legal challenge focuses on:
 - A facial discrimination challenge to the wine delivery statute
 - A discriminatory in effect challenge, because the law does not permit wine retailer shipping and hence denies access to retailers located a good distance from Indiana that can't deliver

Wine Retailer Shipping Cases

Oral Argument Cases

- ▶ Interesting panel: Easterbrook, who has been an adversary in two wine shipping cases. Kanne, who ruled favorably in a wine retailer shipping case, & Scudder, a recently appointed judge
- ▶ Will Kanne or Easterbrook change or remain consistent with their precedents

Wine Retailer Shipping Cases

Oral Argument Cases

- ▶ As delivery is a facial discrimination issue and shipping is a discriminatory in effect issue, there could be two different outcomes
- ▶ Facial discrimination is subject to strict scrutiny
- ▶ With discriminatory in effect, it's harder to get to strict scrutiny

Wine Retailer Shipping Cases

Oral Argument Cases

Legal Standard Departure

- ▶ The 7th Circuit seemed to depart from the legal standard used by the lower court
- ▶ The lower court employed the *Pike* balancing test, which is a lower form of legal scrutiny
- ▶ The 7th Circuit ignored *Pike* and only discussed the U.S. Supreme Court's *Tennessee Wine* standard, which employs strict scrutiny

Wine Retailer Shipping Cases

Oral Argument Cases

- ▶ The big impact item in this case was the discussion around *Lebamoff v. Rauner*
- ▶ In *Lebamoff*, the 7th Circuit reversed and remanded a district court decision that upheld Illinois' discriminatory wine retailer shipping laws
- ▶ Chief Judge Wood railed against the law as protectionist and discriminatory

Wine Retailer Shipping Cases

Oral Argument Cases

- ▶ The 7th Circuit panel seemed to indicate they were bound by *Lebamoff*
- ▶ In *Lebamoff*, the 7th Circuit decision was based on the impermissibility of discrimination
- ▶ The 7th Circuit could hold its bound by the *Lebamoff* precedent, but still provide a mix decision

Wine Retailer Shipping Cases

Oral Argument Cases

- ▶ Deeming *Lebamoff* 7th Circuit precedent would seem to put the 7th Circuit at odds with the 6th and 8th Circuit
- ▶ The 6th and 8th Circuit permitted facially discriminatory shipping laws, if the 7th Circuit deems facially discriminatory delivery laws unconstitutional, it would deviate from the 6th and 8th
- ▶ Hence there seems to be a circuit split

Wine Retailer Shipping Cases

Oral Argument Cases

- ▶ *Would the Supreme Court take the case?*
- ▶ Yes, because there is a difference in opinion on discriminatory laws from the 6th and 8th
- ▶ No, the fact situations are different between these cases, so the pure circuit split is not there
- ▶ The Court could wait for the 7th Circuit to apply its standard to a wine retailer shipping case

Wine Retailer Shipping Cases

Oral Argument Cases

- ▶ Either way, if the 7th Circuit confirms that the *Lebamoff* standard applies to 7th Circuit cases, it is a positive development
- ▶ The Illinois district court case would be beholden to *Lebamoff*
- ▶ Illinois' discriminatory wine retailer shipping law would be in great danger
- ▶ A final adjudication by the 7th Circuit would demonstrate a pure circuit court split

Wine Retailer Shipping Cases

Oral Argument Cases

B-21 Wines v. Guy

- ▶ Challenge to North Carolina's wine retailer shipping law
- ▶ The law allows North Carolina retailers to ship but does not afford this same privilege to out-of-state retailers

Wine Retailer Shipping Cases

Oral Argument Cases

- ▶ The main issue was Judge Wilkinson's fascination with the law being discriminatory, but the remedy not favoring the retailer
- ▶ He believed that overturning the law would achieve evenhandedness, but also undermine North Carolina's interest in its three-tier system
- ▶ Another big issue was whether North Carolina's law protects an essential element of the three-tier system

Wine Retailer Shipping Cases

Oral Argument Cases

- ▶ Tanford responded that 16 states run a regulatory system, while still allowing wine retailer shipping
- ▶ The standard in *Tennessee Wine* is whether a state could operate a regulatory system without an element, if so, it is not essential
- ▶ Another theme is the NC Attorney General taking liberties with Supreme Court precedent

Wine Retailer Shipping Cases

Oral Argument Cases

- ▶ He essentially started making up legal doctrine
- ▶ He indicated that in *Tennessee Wine*, physical presence is a non-discriminatory reasonable alternative
- ▶ The Supreme Court never made this claim, it is a legal fiction, never endorsed in any Supreme Court case law

Wine Retailer Shipping Cases

What is at stake in these cases

- ▶ If the retailers can win a case at the circuit court level, a circuit split is created
- ▶ This may force the Supreme Court to finally take up the issue of interstate wine retailer shipping
- ▶ The Supreme Court will have the final say on how *Tennessee Wine* applies
- ▶ Lower circuit courts seem more worried about the three-tier system than applying the law

Arguments being made

Wine Retailer Shipping Cases

Arguments being made

- ▶ The other side wants to make this about the three-tier system
- ▶ Allowing wine retailer shipping would create a hole in the state regulatory system
- ▶ This would undercut the state's interest to regulate under the 21st Amendment

Wine Retailer Shipping Cases

Arguments being made

- ▶ We want to make this about the Commerce Clause and discrimination
- ▶ This would not undercut the state's interest to regulate under the 21st Amendment
- ▶ 16 states allow out-of-state wine retailer shipping and still run a robust regulatory system
- ▶ Permitting access to the marketplace does not destroy it

Provi lawsuit

Provi lawsuit

- ▶ Provi is an online platform which connects retailers to products they want to order
- ▶ Retailers can check across all wholesalers to find desired products
- ▶ The lawsuit alleges:
- ▶ Southern Wine and Spirits and Republic National Distributing Company, sought to setup a competitor
- ▶ They refused to allow retailers access to their product offerings on Provi

Provi lawsuit

- ▶ Southern and RNDC utilized their powers to shut off access to Provi
- ▶ In some states Southern and RNDC constituted 85% of the market
- ▶ Their platforms refused to accept orders from Provi's platform
- ▶ Southern and RNDC communicated to retailer customers, they would no longer accept Provi orders

Provi lawsuit

- ▶ Provi is suing RNDC and Southern for violating the Sherman Anti-Trust Act
- ▶ Provi's complaint is well written by anti-trust experts
- ▶ There is evidence of emails and other communication that is troubling for Southern and RNDC
- ▶ This is a very legitimate lawsuit

Predictions

Predictions

- ▶ The 7th Circuit decision is favorable
- ▶ It inevitably leads to a circuit split and provides positive precedent
- ▶ The case goes to the U.S. Supreme Court in 2-3 years
- ▶ Southern and RNDC settle the Provi lawsuit, depositions would get ugly

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