

More Shipping, More Problems

Complications from Interstate Wine Sales are Now Coming into Focus

BY KEVEN DANOW

Today, out-of-state sales to New York wine drinkers pose a tremendous threat to package stores in New York, and the problem will likely exacerbate. In *Granholm v. Heald* the Supreme Court warned that a state law which mandates preferential treatment of in-state economic interests over out-of-state economic interests will violate the Commerce Clause of the United States Constitution unless the state can demonstrate that the discrimination advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.

Since the *Granholm* decision, both legal and illegal interstate shipments of beverage alcohol have been growing with incredible speed. Today direct-to-consumers wine sales represent more than \$1.34 billion annually.

Granholm Only Just the Start

In part, the *Granholm* Decision was based upon court assumptions that are proving to be fallacious. For instance, the Court seemed to believe that Internet sales to minors would not raise a significant problem and that states would be able to collect substantially all taxes due from out-of-state shippers. A new study from University of North Carolina at Chapel Hill reported that underage consumers have demonstrated a greater than expected ability to buy beer, wine and spirits from Internet vendors; in the study, 45% of illegal attempts to purchase alcohol via the Web were successful. Also, although wineries that sell direct to consumer with appropriate permits pay sales and excise taxes, most out-of-state retailers do not.

The problem is growing; it cannot be ignored. Beverage alcohol attorneys are pushing the idea of “trusted vendors”

and “third party providers.” These are companies that are trying to capitalize on the good will of their trademarks to sell wine. In most cases, the perceived “vendor” does not hold a license in New York. This raises the issue of availing.

Licenses are Not for Sharing

It is against the law for a licensee to make its license available to a person or company not on its license. California’s attorney general issued an Industry Advisory warning about availing. Most of the direct shipments of wine come from California; and California is interested in an increase in the sale of California wine. Third party providers move a lot of California wine. California’s attorney general withdrew the first Advisory and replaced it with one which sanctioned third party providers. In this case, what is good for California may be bad for New York.

Whether a third party provider is engaged in a legal business like advertising or is availing on the license must be determined based upon the individual facts and circumstance. If the facts demonstrate that the consumer knows he or she is purchasing directly from the licensee and the third party provider is merely redirecting the consumer to the licensee’s website, there is less of a likelihood of availing.

On the other hand, if the “trusted vendor” has a small footnote stating that sales in New York are directed through a retailer, that all shipping and delivery terms are set by the vendor, and/or the vendor offers free or discounted delivery, coupons and credits for returns, then there is a strong likelihood of availing. If the vendor receives a percentage of the sales price, it is more likely to be availing on a license. Conversely, if the

vendor receives a flat fee or a fee per transaction, it is less likely to be considered availing.

Fine Print Changes Sales Context

Sales into New York by out of state retail licensees are usually based upon a claim that the sale actually took place in the home state of the licensee. The licensee includes in its terms of sale a statement that the sale takes place in California and is subject to California sales tax. The retailer further states that the consumer is appointing the California retailer as his or her agent to arrange for shipment. Finally, the terms of sale provide that the consumer is responsible to comply with the laws of New York.

In this way, the retailer attempts to distance itself from New York and wash its hands of its obligation to comply with New York law. California receives the excise tax on the wine. If the vendor collects and pays sales tax, California receives that too. New York is left in the cold. No excise tax, no sales tax, and no income tax. If the University of North Carolina at Chapel Hill report is to be believed, New York suffers with the resulting problems from underage drinking. Last, but far from least, New York retailers lose business and revenue.

In the *Granholm* decision the Supreme Court rejected New York State’s claim that direct shipment from outside the state would result in an increase in access to beverage alcohol by minors and a reduction in the collection of taxes. The Court was wrong. ■

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