Tennessee Challenges Direct Shippers – Another Rock in the Pond

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Authors:

Charles M. Johnson

Ryan W. Goellner

On July 14, 2023, the State of Tennessee filed a complaint against six out-of-state businesses alleged to have directly shipped alcoholic liquors to consumers in Tennessee in violation of the 21st Amendment, the Tennessee Consumer Protection Act, and state liquor laws. In a press release, issued contemporaneously with the filing of the complaint, the Tennessee attorney general noted that during six separate investigations, undercover agents from the Tennessee Alcoholic Beverage Commission purchased and received unauthenticated and untaxed distilled spirits from each of the defendants: Bottle Buzz, Inc., Cask Cartel Distilleries and Distribution (Cask Cartel Premium Spirits has been substituted for this defendant), The Liquor Bros, My Bev Store, Prime Time Liquors, and Wooden Cork Enterprises, Inc. As a result of these direct shipments, each defendant is alleged to have violated Tennessee's alcohol licensing laws which are designed to protect consumers in Tennessee and comply with the 21st Amendment of the U.S. Constitution.

Tennessee laws do authorize the direct shipment of wine to consumers in Tennessee upon obtaining a direct shipper's license. However, there is no license in Tennessee which authorizes the direct shipment of liquor directly to consumers. In the complaint, the State of Tennessee alleges that the defendants assert a "work-around" to the unauthorized direct shipment of distilled spirits to consumers in Tennessee by insinuating on their websites in various manners that the direct-shipper defendants are an agent of retailers licensed in Tennessee where the purchase occurs and that each website was working as an agent for the local retailer, which effectively completes the sale locally.

The State of Tennessee maintains that the defendants engaged in deceptive practices in violation of the Tennessee Consumer Protection Act and that the state also suffered a loss in tax revenue generated by the improper sale of distilled spirits to residents in Tennessee through this direct-shipping arrangement. None of the defendants have answered yet, so their position remains to be seen. However, even if such a "work-around" arrangement was in place for each of the defendants, the State of Tennessee asserts that there is no direct shipping license for distilled spirits in Tennessee and such arrangements violated Tennessee laws governing retail sales of distilled spirits and Section 2 of the 21st Amendment. With a response from the defendants anticipated shortly, the spirits industry anxiously awaits the legal ramifications of this state-level challenge, as it could have a dramatic effect on the direct shipment of liquor across the United States.

Background

On the heels of the COVID-19 pandemic, many states liberalized their laws to allow for local delivery of wine, beer and liquor. A lack of access and choice locally, coupled with an explosion in the popularity of bourbon, tequila, and ready-to-drink cocktails worldwide, led many consumers to find their favorite pours throughout-of-state websites that promised direct shipment to their homes with very few hurdles. The rapid growth of direct shipments from out-of-state websites resulted in local challenges to direct shipment in many states, including Tennessee, Ohio, and Michigan.

The First Rock in the Pond

In 2020, Lebamoff Enterprises, Inc., an Indiana wine retailer, challenged a 2018 Michigan law that allowed in-state wineries to deliver wine directly to consumers while there was no such authorization for out-of-state retailers. In the initial decision, the district court sided with Lebamoff and overturned the 2016 law as treating out-of-state and in-state retailers differently, thus violating the Commerce Clause. Upon appeal, the U.S. Court of Appeals for the Sixth Circuit overturned the district court and held that the Commerce Clause led to a different test based on the local laws governing alcohol sales and whether they can be justified as a public health and safety measure or some other legitimate basis that is not seen as protectionist. The U.S. Supreme Court denied cert on January 11, 2021.

The Second Rock Is Thrown

On the heels of *Lebamoff*, in July of 2020, Kenneth Miller, an Ohio wine consumer, and House of Glunz, an Illinois wine retailer, challenged Ohio laws that prohibit out-of-state liquor retailers from shipping liquor to Ohioans and that limit the amount of wine that can be transported out of Ohio. The district court in *Block v. Canepa* , on February 17, 2021, upheld the Ohio limitations ruling that the recent *Lebamoff* decision in Michigan was dispositive as to the similar limitations in Ohio. However, upon appeal, the Sixth Circuit recently reversed the district court's decision upholding the limitations based solely on *Lebamoff*. On July 14, 2023, the Sixth Circuit reversed the district court's ruling in *Block* and remanded the case back to the district court to develop factual findings addressing the factors announced by the U.S. Supreme Court in *Tennessee Wine & Spirits Retailers Association v. Thomas*.

The Supreme Court's *Tennessee Wine* holding overturned the residency requirements for retail licenses in Tennessee as protectionist, and in doing so provided a multi-factor test to consider when balancing a state's interests in protecting public health and safety against the public's interest in avoiding unlawful protectionism. The Sixth Circuit remanded *Block v. Canepa* for a full development of the facts for and against such restrictions, while affirming the standing of the plaintiffs and ruling that the Ohio Department of Public Safety had immunity in this matter.

The Splash Will Be Huge

The new Tennessee challenge is the third rock in the pond but is the first attack by a state on the legality of the direct-shipping arrangement in question. The stage is perfectly set for a showdown in the Sixth Circuit balancing local authority to protect public health and safety and the need for the industry and consumers alike to avoid unlawful protectionism. This balance is now being carefully drawn, and state regulators, industry analysts, distilleries, wineries and breweries, distributors, retailers and direct shippers alike are nervously watching these developments with an eye toward settling these issues and carving up billions of dollars in revenues—each hoping for a larger slice on their plate.

For more information, contact Charles M. Johnson or Ryan Goellner of Frost Brown Todd's Consumable Goods team.

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