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Committee on Regulated Industries

DIRECT SHIPMENT OF WINE TO FLORIDA CONSUMERS

Statement of the Issue

In 2006, the Senate Committee on Regulated Industries published an interim report regarding the direct shipment of wine to Florida consumers.¹ This Issue Brief is intended to supplement that report by analyzing the affect of the 2008 United States Supreme Court decision in *Rowe v. New Hampshire Motor Transport Association*² on the direct shipment of wine to Florida consumers. In *Rowe*, the U.S. Supreme Court held that the federal regulation of carriers preempted the State of Maine's regulations for the delivery of tobacco products that were intended to prevent the delivery and sale of tobacco products to minors. There is uncertainty regarding the extent to which the *Rowe* decision limits the state's ability to regulate the direct shipment of wine to Florida consumers by imposing requirements on common carriers relating to package labeling, record keeping, and age verification of the recipient. During the 2006, 2007, and 2008 Regular Sessions, several Senate bills were introduced that would have imposed requirements on common carriers relating to package labeling, record keeping, and age verification of the recipient. None of the bills passed the Legislature.

Some of the bills that were introduced also would have limited the direct shipment of wine to manufacturers who produce less than 200,000 gallons of wine per year.³ Other states have imposed similar restrictions. This issue brief reviews the status of judicial challenges to the gallonage limitations in other states.

Discussion

The 2006 Senate interim report reviewed the effect of the 2005 U.S. Supreme Court's decision in *Granholm v. Heald*,⁴ which held that a state cannot allow in-state wineries to sell wine directly to consumers in that state while simultaneously prohibiting out-of-state wineries from also selling wine directly to consumers. The decision invalidated laws in Michigan and New York that discriminated between in-state and out-of-state wine manufacturers in this manner and thus violated the Commerce Clause, Art. I, s. 8, cl. 3 of the U.S. Constitution. Florida law allows in-state wineries to sell directly to consumers, while prohibiting out-of-state wineries from shipping directly to Florida consumers.⁵ Florida's prohibition was determined to be unconstitutional in the case of *Bainbridge v. Turner*,⁶ in which wine consumers and out-of-state wineries brought an action challenging Florida's statutory scheme.

During the 2008 Regular Session, three Senate bills were introduced to regulate the direct shipment of wine to Florida consumers. CS/SB 1096 1st Eng. by the Finance & Tax Committee, and Senator Margolis passed the Senate but died in messages. SB 1736 by Senator Geller was withdrawn from further consideration and SB 2608 by Senator Saunders died in the Regulated Industries Committee. There were other bills introduced for the 2006 and 2007 Regular Sessions that also failed to pass both chambers.⁷

¹ *Direct Shipment of Wine to Florida Consumers*, Interim Report No. 2006-146, Florida Senate Committee on Regulated Industries, October 2005.

² *Rowe v. New Hampshire Motor Transport Association*, 128 S.Ct. 989 (2008).

³ See CS/SB 1096 (2008), CS/CS/SBs 126 & 2282 (2007), and CS/SBs 144 & 944 (2006).

⁴ *Granholm v. Heald*, 544 U.S. 460 (2005).

⁵ Sections 561.54 and 561.545, F.S.

⁶ *Bainbridge v. Turner*, No. 8:99-CV-2681-T-27TBM (M.D. Fla., Tampa Division)(Unpublished Order by Judge James D. Whittemore dated August 5, 2008)(On file with the Regulated Industries Committee).

⁷ CS/CS/SBs 126 & 2282 by the Regulated Industries Committee and Senators Saunders and Geller (2007) died in the Senate Criminal Justice Committee. CS/CS/SB 282 by the Committee on General Government Appropriations, the Regulated

These bills would have imposed requirements on common carriers relating to package labeling, record keeping, and age verification of the recipient which may be affected by the 2008 U.S. Supreme Court decision in *Rowe v. New Hampshire Motor Transport Association*. The Maine regulations that were invalidated in the *Rowe* case were similar to the types of regulations some of the previously introduced bills would have imposed on common carriers for the delivery of wine to consumers.

Some of the bills also would have limited the direct shipment of wine to manufacturers who produce less than 200,000 gallons of wine per year. Other states have enacted this type of gallonage limitation and have had the limitation judicially challenged.

Rowe v. New Hampshire Motor Transport Association

In *Rowe v. New Hampshire Motor Transport Association*, the U.S. Supreme Court held that federal regulation of carriers through the Federal Aviation Administration Authorization Act of 1994 (FAAAA)⁸ pre-empted the State of Maine's regulations for the delivery of tobacco that were intended to prevent delivery and sale of tobacco products to minors. The act provides that "a State ... may not enact or enforce a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property."⁹ With respect to the direct shipment of wine, the *Rowe* decision appears relevant to the extent to which Florida can impose requirements on the common carriers.

Under the Maine law,¹⁰ anyone other than a Maine-licensed tobacco retailer was forbidden to accept an order for delivery of tobacco. It required licensed retailers who accept orders and shipments of tobacco to "utilize a delivery service" that provides a recipient-verification service as described in the act. The tobacco retailers were required to select a delivery service that made certain that:

- (1) The person who bought the tobacco is the person to whom the package is addressed;
- (2) The person to whom the package is addressed is of legal age to purchase tobacco;
- (3) The person to whom the package is addressed has himself or herself signed for the package; and
- (4) The person to whom the package is addressed, if under the age of 27, has produced a valid government-issued photo identification with proof of age.

Violations of these restrictions were punishable by civil penalties of \$1,500 for a first offense and up to \$5,000 for subsequent offenses.

The Maine law also forbade any person "knowingly" to "transport" a "tobacco product" to "a person" in Maine unless the sender or the receiver has a Maine license.¹¹ It also provided that a "person is deemed to know that a package contains a tobacco product" if:

- (1) The package is marked as containing tobacco and displays the name and license number of a Maine-licensed tobacco retailer; or
- (2) The person receives the package from someone whose name appears on a list of unlicensed tobacco retailers that Maine's Attorney General distributes to various package-delivery companies.

The Supreme Court held that federal preemption may occur even if a state law's effect on rates, routes or services "is only indirect." It held that, in respect to preemption, it makes no difference whether a state law is "consistent" or "inconsistent" with federal regulation, and that preemption occurs at least where state laws have a "significant impact" related to Congress' deregulatory and preemption related objectives, which it described as helping assure transportation

Industries Committee and Senator Dockery (2006) died on the Senate Special Order Calendar. CS/SBs 144 & 944 by the Regulated Industries Committee and Senators Saunders and Geller (2006) died in the Senate General Government Appropriations Committee.

⁸ 108 Stat. 1605-1606, codified at 49 U.S.C. ss. 14501(c)(1) and 41713(b)(4)(A).

⁹ 49 U.S.C. s. 14501(c)(1). See also similar language in 49 U.S.C. s. 41713(b)(4)(A) for combined motor-air carriers.

¹⁰ See An Act to Regulate the Delivery and Sales of Tobacco Products and To Prevent the Sale of Tobacco Products to Minors, Me.Rev.Stat. Ann., Tit. 22, ss. 1555-C and D.

¹¹ Me. Rev. Stat. Ann., Tit. 22, s. 1555-D.

rates, routes, and services that reflect “maximum reliance on competitive market forces,” thereby stimulating “efficiency, innovation, and low prices.”¹²

The court further held that the Maine law, by forbidding the use of a particular delivery service, unless it complied with the law’s restriction, had a “significant” and adverse “impact” in respect to the objective of federal regulation of these delivery services. The court noted that the state law would require the carriers to offer a system of services that the market does not now provide, and which must be dictated by the market.

The Supreme Court also rejected Maine’s argument that the state’s regulations were intended to prevent minors from obtaining cigarettes because the federal preemption of this subject does not provide an exception for the state’s public health concerns.

The Supreme Court’s reasoning in *Rowe* is based on the constitutional doctrine of federal preemption. The federal preemption doctrine is derived from the Supremacy Clause of the U.S. Constitution which requires that federal law prevails when federal law and state law conflict.¹³ The Supremacy Clause applies to invalidate a state law that is inconsistent with federal law, attempts to invalidate the substance of a federal law or treaty, or encourages conduct that is inconsistent with what is required by federal law. The state law may also be invalidated if it forbids conduct that federal law is designed to foster, or interferes with the achievement of a federal objective.¹⁴

Effect of Rowe on the Regulation of Direct Shipment

It is not clear what effect the *Rowe* decision will have on the regulation of direct shipping, particularly regarding the extent to which states can regulate direct shipment by imposing delivery, record keeping, and reporting requirements on common carriers. This uncertainty is based on the differences between the regulation of tobacco, which was the subject in *Rowe*, and the regulation of alcoholic beverages.

No case has ruled directly on the issue of whether states, in light of the *Rowe* decision, can impose requirements on common carriers as part of their regulation of direct shipping. However, in a recent court challenge to Indiana’s direct shipping regulations, *Baude v. Health*,¹⁵ the Seventh Circuit Court of Appeals noted that under *Rowe* “states cannot require interstate carriers to verify the recipients’ age.”¹⁶ The main reason to conclude that the *Rowe* decision does limit the state’s ability to impose direct shipping regulations on the common carriers is the holding in *Rowe* which appears to directly invalidate state laws that impose restrictions or requirements on common carriers because the regulation of common carriers is preempted by federal law.¹⁷ The Wine and Spirit Wholesalers of America supports the view that the *Rowe* decision applies and that the decision renders age verification statutes unenforceable if they require the common carrier to verify the age of the recipient or purchaser at the time of delivery.¹⁸

An argument can also be made that the *Rowe* decision does not affect the state regulation of direct shipment through common carriers. The federal preemption concerns may be negated by the U.S. Constitution and a specific federal statute that authorizes state laws regulating the delivery of alcoholic beverages. Comparable constitutional provisions and federal laws that authorize state regulation of alcoholic beverages do not exist for the sale and delivery cigarettes. The Twenty-first Amendment of the U.S. Constitution prohibits the importation of alcoholic beverages into a state in

¹² See *Rowe*, quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

¹³ Article VI, United States Constitution (Supremacy Clause).

¹⁴ See *Perez v. Campbell*, 402 U.S. 637 (1971); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

¹⁵ *Baude v. Health*, 538 F.3d 608, (7th Cir. 2008). Decided August 7, 2008, the case challenged provisions of an Indiana law that allowed wineries to ship to customers if there was a face-to-face meeting to determine the buyer’s age and other particulars and that prohibited wineries from direct shipping to consumers if it had a wholesaler’s license in any state. The court held “the wholesale prohibition, Ind. Code § 7.1-3-26-7(a)(6), to be unconstitutional insofar as it bars wineries that possess wholesale privileges in states other than Indiana from seeking a Direct Wine Seller’s permit.” The court upheld the face-to-face requirement found in Ind. Code ss. 7.1-3-26-6(4) and 7.1-3-26-9(1)(A), as constitutional.

¹⁶ 538 F.3d at 613.

¹⁷ *Supra* at n. 8.

¹⁸ See Press Release from the Wine and Spirit Wholesalers of America found at <http://www.wswa.org/content.cfm?sectionID=20&detail=41>. (Last visited October 20, 2008).

violation of that state's laws. The Webb-Kenyon Act¹⁹ prohibits the shipping of alcoholic beverages into a state in violation of that state's laws.

The District Court's opinion in *Rowe* may support the argument that the federal preemption analysis may not apply to the state regulation of direct shipping. The federal District Court noted that the Supreme Court's decision in *Granholm* was not relevant to issues presented by Maine's regulations of common carriers because the *Granholm* decision was based on the Commerce Clause, not the FAAAA, and focused extensively on the Twenty-First Amendment, which deals with alcohol, but not tobacco, and on federal statutes regulating the sale of alcohol.²⁰ The Supreme Court decision in *Rowe* did not address the relevance of the *Granholm* decision.

Representatives of the wine industry support the viewpoint expressed by the general counsel for ShipCompliant.²¹ The wine industry does not believe that the 1994 FAAAA motor freight legislation repeals or amends the Webb-Kenyon Act and that the Twenty-first Amendment to the U.S. Constitution would also preempt the application of the FAAAA to prohibit state regulation of shipments of alcoholic beverages by common carriers.

Gallage Limits

Four states have imposed limits on the number of gallons that wineries can produce annually to be eligible to direct ship wines to consumers in the state. Gallage limits are also known as "capacity caps." The following states have imposed gallage limits:

Arizona	20,000 gallons ²²
Kentucky	50,000 gallons ²³
Massachusetts	30,000 gallons ²⁴
Ohio	250,000 gallons ²⁵

Lawsuits have been filed to challenge the constitutionality of these gallage limits in Kentucky, Massachusetts, and Arizona. The gallage limits in Arizona and Kentucky have been held to be constitutional.

In the Kentucky case, *Cherry Hill Vineyards v. Hudgins, L.L.C.*,²⁶ the out-of-state winery that challenged the 50,000 gallon production limit argued that the limit was protectionist and discriminated against out-of-state wineries because all of the in-state wineries annually produced less than the gallage limit. The court held that the gallage limit did not discriminate against out-of-state state producers and did not violate *Granholm* because the limit provides similar licensing opportunities to in-state and out-of-state wineries. The court stated that the limit does not give Kentucky wineries a competitive advantage over similarly situated out-of-state wineries.

In the Arizona case, *Black Star Farms, L.L.C. v. Oliver*,²⁷ the out-of-state winery also argued that the state's 20,000 gallon production limit discriminated against out-of-state wineries. The court rejected this argument and held that the limit was facially neutral. The court noted that, as of 2004, more than half of the 2000 wineries in the United States were able to qualify under the Arizona gallage cap. It noted that the number of wineries that produced less than 20,000 gallons of wine a year "dwarfed the number of in-state wineries" that were able to qualify for Arizona's direct

¹⁹ 27 U.S.C. s. 122,

²⁰ *Rowe v. New Hampshire Motor Transport Association*, 377 F.Supp.2d 197 (D. Me. 2005).

²¹ ShipCompliant is a company which provides direct shipping compliance checks and reporting for more than 600 wine brands throughout the United States in partnership with other Wine Industry groups such as the Wine Institute (California Wineries), the National Association of American Wineries, the Oregon Winegrowers' Association, the Washington Wine Institute, and Family Winemakers of California. See "Another Rowe to Hoe" by R. Corbin Houchins, Beverage Industry Counsel at <http://shipcompliantblog.com/blog/2008/02/25/another-rowe-to-hoe/>. (Last visited October 20, 2008).

²² Sections 4-203.04 and 4-205.04, Ariz. Rev. Stat.

²³ Ky. Rev. Stat., s. 243.155.

²⁴ Mass. Gen Laws, ch. 138, s. 19F.

²⁵ Ohio Rev. Code, s. 4303.232.

²⁶ *Cherry Hill Vineyards v. Hudgins, L.L.C.*, 488 F.S. Supp.2d 601 (W.D. Ky. 2006).

²⁷ *Black Star Farms, L.L.C. v. Oliver*, 544 F.Supp.2d 913 (D. Ariz. 2008).

shipment license. The court also stated that “the simple fact that there are more out-of-state wineries than in-state wineries that produce more than 20,000 gallons of wine per year and are thus required to adhere to the three-tiered distribution system in order to gain access to Arizona’s wine market does not by itself establish patent discrimination in effect against interstate commerce.”²⁸

As of this writing, the law suit filed by the Family Winemakers of California challenging the gallonage limit in Massachusetts has not been decided and is awaiting a decision on the plaintiff’s motion for summary judgment.²⁹ There is currently no litigation challenging the Ohio gallonage limitation.

²⁸ *Id.* at 925-926.

²⁹ *Family Winemakers of California v. Jenkins*, No. 1:06-CV-11682-RWZ (E.D. Mass 2008).