

Direct Shipment of Wine to Florida Consumers

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Background

A. Florida's Three-Tier System

In the United States, the regulation of alcohol has traditionally been through what is termed the “three-tier system.” The system requires that the manufacture, distribution, and sale of alcoholic beverages be separated. Retailers must buy their products from distributors who in turn buy their products from the manufacturers. Manufacturers cannot sell directly to retailers or directly to consumers. The system is also deeply rooted in the perceived evils of the “tied house” in which a bar is owned or operated by a manufacturer or the manufacturer exercises undue influence over the retail vendor.¹

There are some exceptions to this regulatory system, usually for special circumstances. Typically the exemptions include allowing beer brewpubs to manufacture malt beverages and to sell them to consumers,² allowing individuals to bring small quantities of alcohol back from trips out-of-state,³ and allowing in-state wineries to manufacture and sell directly to consumers.⁴

In Florida, alcoholic beverages are regulated by the Beverage Law.⁵ These provisions regulate the manufacture, distribution, and sale of wine, beer, and liquor via manufacturers, distributors, and vendors.⁶ The Division of Alcoholic Beverage and Tobacco within the Department of Business and Professional Regulation is the agency authorized to administer and enforce the Beverage Law.⁷

In a three-tier system, each license classification has clearly delineated functions. For example, in Florida, only licensed vendors are permitted to sell alcoholic beverages directly to consumers at retail.⁸ Manufacturers of wine may not be

¹ Erik D. Price, *Time to Untie the House? Revisiting the Historical Justifications of Washington's Three-Tier System Challenged by Costco v. Washington State Liquor Control Board*, a copy can be found at:

<http://www.wsba.org/media/publications/barnews/2004/june-04-price.htm> (last visited September 20, 2005).

² See s. 561.221(2), F.S., which permits the limited manufacture of beer by vendors (brew pubs).

³ See s. 562.16, F.S., which permits the possession of less than one gallon of untaxed alcoholic beverages when purchased by the possessor out-of-state in accordance with the laws of the state where purchased and brought into the state by the possessor.

⁴ See s. 561.221, F.S.

⁵ The Beverage Law means chs. 561, 562, 563, 564, 565, 567, and 568, F.S. See s. 561.01(6), F.S.

⁶ See s. 561.14, F.S.

⁷ Section 561.02, F.S.

⁸ Section 561.14(3), F.S. However, see discussion below regarding the exception for certified Florida Farm Wineries in s. 561.221, F.S.

licensed as a distributor.⁹ Florida law also prohibits any distributor or vendor from having an interest in any manufacturer.¹⁰

Although *Granholm v. Heald* held that states can regulate alcoholic beverages through a three-tier system, the court also held that the states cannot provide an exception to that system that is limited to in-state businesses, i.e., in-state wine manufacturers.

Sales by out-of-state alcoholic beverage manufacturers and retailers to consumers in another state made outside established three-tier systems are commonly termed “direct shipment.” The term also includes sales made directly to consumers by in-state manufacturers.

B. *Granholm vs. Heald*

In *Granholm v. Heald* (*Granholm*),¹¹ consolidated cases from Michigan and New York, the U.S. Supreme Court 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.

Michigan and New York regulate the sale and importation of wine through three-tier systems and require separate licenses for manufacturers, wholesalers, and retailers. These schemes allow in-state, but not out-of-state, wineries to make direct sales to consumers. The Court held that this differential treatment violated the Commerce Clause, Art.I, s. 8, cl. 3 of the U.S. Constitution, which provides that “[t]he Congress shall the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”

1. Michigan Law

Under Michigan law, wine producers must distribute their wine through wholesalers. Michigan has an exception for the approximately 40 in-state wineries that are eligible for a wine maker license that allows the direct shipment of wine to in-state consumers. Out-of-state wineries can apply for an out-of-state seller of wine license that allows them to sell to in-state wholesalers, but not directly to Michigan consumers.

⁹ See s. 561.24, F.S. However, see discussion below regarding the exception for Florida manufacturers of wine in s. 561.221, F.S.

¹⁰ See s. 561.42, F.S.

¹¹ *Granholm v. Heald*, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005).

In the Michigan case, Michigan residents, joined by an out-of-state winery, sued Michigan officials, claiming that the state's laws violated the Commerce Clause. The state and an in-state wholesalers association responded that the direct shipment ban was a valid exercise of Michigan's power under the Twenty-first Amendment of the U.S. Constitution. The Twenty-first Amendment provides in section 2 that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited." The District Court sustained the scheme, but the Sixth Circuit reversed, rejecting the argument that the Twenty-first Amendment immunizes state liquor laws from Commerce Clause provisions and holding that there was no showing that the state could not meet its policy objectives through nondiscriminatory means.

2. New York Law

New York's licensing scheme is somewhat different from Michigan's. It also provides for distribution through the three-tier system and makes exceptions for in-state farm wineries. Wineries that produce wine only from New York grapes can apply for a license that allows direct shipment to in-state consumers. An out-of-state winery may ship directly to consumers only if the winery becomes licensed as a New York Winery, establishes a distribution operation in New York, and has a physical presence in the state, i.e., a warehouse, office, or storeroom. Moreover, out-of-state wineries that establish the requisite in-state presence are still not eligible for the farm winery license that provides the most direct means of shipping to New York consumers. Instead, they must obtain a separate license that authorizes direct shipping to consumers. New York law does not require separate direct shipping license for its farm wineries.

In the New York case, out-of-state wineries and their New York customers filed suit against state officials, seeking a declaration that the State's direct shipment laws violated the Commerce Clause. State liquor wholesalers and retailers' representatives joined in support of the state. The District Court granted the plaintiffs' summary judgment against the state, but the Second Circuit reversed, holding that New York's laws fell within the state's powers under the Twenty-first Amendment.

3. Supreme Court Decision

The United States Court of Appeals for the Sixth Circuit in Michigan ruled for the plaintiffs and held that the Michigan law prohibiting direct shipment of wine to

consumers violated the Commerce Clause of the U. S. Constitution.¹² The United States Court of Appeals for the Second Circuit in New York upheld a similar constitutional challenge to New York's direct shipping laws.¹³ The United States Supreme Court consolidated these cases into a single case to address this issue:

Does a State regulatory scheme that permits in-state wineries to directly ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Section 2 of the Twenty-first Amendment?

The U.S. Supreme Court held in *Granholm* that:

the laws in both States discriminate against interstate commerce in violation of the Commerce Clause, Art. I, s.8, cl. 3, [United States Constitution] and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment. Accordingly, we affirm the judgment of the Court of Appeals for the Sixth Circuit, which invalidated the Michigan laws; and we reverse the judgment of the Court of Appeals for the Second Circuit, which upheld the New York laws.

Granholm explicitly noted that states may regulate the distribution and sale of wine via a three-tier system of licensed manufacturers, distributors, and retailers. The Court also noted that states may prohibit the direct shipment of alcoholic beverages to consumers.¹⁴ However, states may not impose requirements on interstate commerce that discriminate in favor of in-state interests. States can regulate imported wine only to the same extent and in the same manner that they regulate domestically produced wine.

C. Florida's Direct Shipping Prohibition

Section 561.545(1), F.S., prohibits the direct shipping of all alcoholic beverages to consumers from out-of-state. It also prohibits common carriers from transporting alcoholic beverages from an out-of-state location to anyone in this state who does not hold a valid manufacturer, wholesaler, or exporter's license, or who is not a state-bonded warehouse.

¹² *Granholm v. Heald*, 342 F.3d 517 (6th Cir. 2003)

¹³ *Swedenburg v. Kelly*, 358 F.3d 223 (2nd Cir. 2004)

¹⁴ The Court's analysis is based, in part, upon the Webb-Kenyon Act, 27 U.S.C. s. 122, which prohibits the shipping of alcoholic beverages into a state in violation of that states laws, and Twenty First Amendment of the U.S. Constitution.

A first violation of this prohibition results in the issuance of an order to show cause why a cease and desist order should not be issued. A violation within two years of a cease and desist order, or within two years of a previous conviction, constitutes a felony of the third degree.

Section 561.545(5), F.S., provides an exception for the direct shipping of sacramental alcoholic beverages to bona fide religious organizations as authorized by the division. It also exempts registered exporters.

Section 561.54(1), F.S., prohibits deliveries of alcoholic beverages from out-of-state by common or permit carriers, operators of privately owned cars, trucks, buses, or other conveyances, except to manufacturers, wholesalers, or exporters, or bonded warehouses in this state. Section 561.54(2), F.S., provides a cause of action for any licensee who is aggrieved by a violation of this prohibition. The court must assess damages equal to three times the amount of delivery charges or the fair market value of the merchandise unlawfully brought into the state. The court must also award the plaintiff its costs and reasonable attorney's fees.

Florida's prohibition against direct shipping is limited to the direct shipping of alcoholic beverages from out-of-state to Florida; it does not prohibit direct shipping from an in-state winery to another state.

D. Sales by Florida Wineries

Florida law provides an exception to the general prohibition against manufacturers of alcoholic beverages selling directly to consumers. Florida permits in-state wine¹⁵ manufacturers to sell their wines directly to consumers. The premises licensed to conduct vendor sales must be situated on property contiguous to the manufacturing process.¹⁶ Florida also permits wineries that are certified by the Department of Agriculture and Consumer Services as a Florida Farm Winery to conduct tastings and sales of wine directly to consumers at Florida fairs, trade shows, expositions, and festivals.¹⁷

¹⁵ Section 564.01(1), F.S., defines the term "wine to mean:

all beverages made from fresh fruits, berries, or grapes, either by natural fermentation or by natural fermentation with brandy added, in the manner required by the laws and regulations of the United States, and includes all sparkling wines, champagnes, combination of the aforesaid beverages, vermouths, and like products. Sugar, flavors, and coloring materials may be added to wine to make it conform to the consumer's taste, except that the ultimate flavor or the color of the product may not be altered to imitate a beverage other than wine or to change the character of the wine.

¹⁶ See s. 561.221(1), F.S.

¹⁷ See s. 561.221(2), F.S.

Florida wine manufacturers may also function in all three tiers of the state's regulatory system. Wineries may distribute any alcoholic beverages, including beer and liquor.¹⁸ Although s. 561.24, F.S., prohibits manufacturers from being licensed as a distributor, this prohibition does not apply to Florida wineries.

E. Certified Florida Farm Wineries

To qualify as a certified Florida Farm Winery, a winery must meet each of the following standards:

1. Produce or sell less than 250,000 gallons of wine annually.
2. Maintain a minimum of 10 acres of owned or managed vineyards in Florida.
3. Be open to the public for tours, tastings, and sales at least 30 hours each week.
4. Make annual application to the department for recognition as a Florida Farm Winery, on forms provided by the department.
5. Pay an annual application and registration fee of \$100.¹⁹

According to industry representatives, many Florida wines are blended with citrus or grapes grown outside the state. Current law does not require that wines from certified Florida Farm Wineries must consist of any particular percentage of Florida-grown grapes or other Florida-grown agriculture products.

F. *Bainbridge v. Turner*

Florida's direct shipping prohibition was challenged in the case of *Bainbridge v. Turner* (*Bainbridge*) by wine consumers and out-of-state wineries.²⁰ This law suit challenged Florida's statutory scheme prohibiting out-of-state wineries from shipping their products directly to Florida consumers while permitting in-state wineries to do so.

Before the Supreme Court issued its decision in *Granholm*, the case resulted in two written federal appellate court opinions. In the first opinion, *Bainbridge v. Martelli* (*Bainbridge I*),²¹ the United States District Court, Middle District of Florida, held that s. 561.54, F.S., and the statutory scheme that bars direct shipping violates the Commerce Clause. In *Bainbridge v. Turner* (*Bainbridge*

¹⁸ See s. 561.14(1), F.S.

¹⁹ See s. 599.004, F.S., which establishes the Florida Farm Winery program within the Department of Agriculture and Consumer Services.

²⁰ *Bainbridge v. Turner*, No. 8:99-CV-2681-T-27TBM (M.D. Fla.)

²¹ *Bainbridge v. Martell*, 148 F.S.Supp.2d 1306 (M.D. Fla. 2001).

II),²² the Eleventh Circuit Court of Appeals held that, if Florida could demonstrate that its statutory scheme was closely related to raising revenue and is not a pretext to mere protectionism, Florida's statutory scheme could be upheld against a Commerce Clause challenge. The appellate court remanded the case to the district court for further consideration of this issue.

The case was held in abeyance because of the pending cases before the U.S. Supreme Court. On August 5, 2005, the United States District Court, Middle District of Florida, issued an order finding ss. 561.54(1)-(2) and 561.545(1), F.S., violated the Commerce Clause and were therefore unconstitutional under the authority in *Granholm*, and enjoined the enforcement of these provisions.²³ The court found that these statutes discriminate against out-of-state wineries by prohibiting them from selling and delivering wine directly to customers in Florida when in-state wineries are not so prohibited.

G. 2005 Regular Session

There were several bills introduced during the 2005 Regular Session allowing direct shipment of wine to consumers in Florida.

SB 480 by Senators Saunders and Dockery provided that any person, firm, corporation or other person that is licensed as an out-of-state shipper may ship wines to any person who is at least 21 years of age. Wines purchased from a direct shipper could not be resold at retail. This bill did not limit the direct shippers license to wine manufacturers. It required consumers to be registered with the Division of Alcoholic Beverage and Tobacco (division) with Department of Business and Professional Regulation (DBPR or department) to receive shipments. It provided that wines could only be shipped to persons to who were registered to receive shipments. It limited out-of-state shippers to shipping no more than four cases (a single case may contain no more than nine liters) of wine to the same person per calendar year. It also limited persons who were registered to receive wines to obtaining no more than four cases of wines per calendar year from an out-of-state direct shipper.

SB 480 required registration as a primary American source of supply under s. 564.045, F.S., quarterly reporting to the division, and payment of all excise and sales taxes. It provided a \$100 fee for registration as a direct shipper. It required that each package containing wine must conspicuously state, "SIGNATURE OF ADDRESSEE AGE 21 OR OLDER REQUIRED FOR DELIVERY." The bill required the signature of the addressee at delivery. It provided third degree felony penalties for direct shippers and common carriers who ship or deliver wine to

²² *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002).

²³ *Bainbridge v. Turner*, No. 8:99-CV-2681-T-27TBM (M.D. Fla. August 5, 2005).

persons under the age of 21. The bill also provided that a person who obtains wine from a direct shipper in violation of the provisions in the bill commits a second degree misdemeanor. SB 480 provided an exception for charitable organizations.

SB 906 by Senators Dockery, Campbell and Argenziano provided that in-state and out-of-state wine producers with valid state and federal permits may be licensed to ship wines directly to any person who is at least 21 years of age for personal use, and wines purchased from a direct shipper could not be resold at retail. It provided a \$100 fee for a direct shippers license. It required registration as a primary American source of supply under s. 564.045, F.S.,²⁴ maintenance of records, monthly reporting to the division, and payment of all excise taxes. The bill did not reference sales taxes. It required maintenance of a \$5,000 bond as a surety for payment of taxes. It required the shipper to pay all attorney's fees and costs in any action to collect unpaid taxes.

SB 906 required that each package containing wine must conspicuously state, "CONTAINS ALCOHOL: SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY." The bill did not require the signature of the addressee at delivery, but required the signature of a person at least 21 years of age. The bill provided that a violation within two years of a cease and desist order from the division constituted a third degree felony.

SB 2552 by Senator Geller provided that any person, firm, corporation or other person that is licensed as an out-of-state direct shipper may ship wines to any person who is at least 21 years of age, and wines purchased from a direct shipper may not be resold at retail. This bill did not limit the direct shippers license to wine manufacturers. Wines could only be shipped to persons who were registered with the division to receive shipments. It also provided that persons registered under the provisions of this bill may, while present at an out-of-state winery that is licensed under the provisions of the bill, purchase and have shipped to Florida no more than two cases (a single case may contain no more than nine liters) of wine per winery and no more than eight cases of wine per calendar year for personal use only.

SB 2552 required registration as a primary American source of supply under s. 564.045, F.S., quarterly reporting to the division, and payment of all excise and sales taxes. It provided a \$100 fee for direct shipper registration. It required that each package containing wine must conspicuously state, "SIGNATURE OF ADDRESSEE AGE 21 OR OLDER REQUIRED FOR DELIVERY." The bill required the signature of the addressee at delivery. It provided third degree felony penalties for direct shippers and common carriers who ship or deliver wine to persons under the age of 21. The bill also provided that a person who obtains wine

²⁴ See discussion in section VI.C. of this report for an explanation of primary American source of supply.

from a direct shipper in violation of the provisions in the bill commits a second degree misdemeanor.

HB 975 by Representative Bogdanoff and others provided that any person, firm, corporation or other person that is licensed as a direct shipper may ship wines to any person who is at least 21 years of age. Such sales would be limited to personal use and direct shipped could not be resold at retail. This bill did not limit the direct shippers license to wine manufacturers.

HB 975 required registration as a primary American source of supply under s. 564.045, F.S., quarterly reporting to the division, and payment of all excise and sales taxes. It provided a \$100 fee for direct shipper registration. It required that each package containing wine must conspicuously state, "SIGNATURE OF ADDRESSEE AGE 21 OR OLDER REQUIRED FOR DELIVERY." The bill required the signature of the addressee at delivery. It provided third degree felony penalties for direct shippers and common carriers who ship or deliver wine to persons under the age of 21. The bill also provided that persons who obtain wine from a direct shipper in violation of the provisions in the bill commit a second degree misdemeanor.

Methodology

Committee staff reviewed the relevant case law and state and Federal statutory provisions, including resources from other states, and the rules adopted by the Department of Business and Professional Regulation (DBPR). Staff met and/or conducted telephone interviews with the staff of the DBPR, the Office of the Attorney General, representatives from the Wine Institute, which is a national proponent of direct shipping, and representatives for the affected industries, including Florida wine manufacturers, alcoholic beverage distributors, retailers, and common carriers. Staff reviewed materials provided by the Florida Coalition to Prevent Underage Drinking. Staff also conducted telephone interviews with representatives from other state governments, the Alcohol and Tobacco Tax and Trade Bureau (formerly the Bureau of Alcohol, Tobacco, and Firearms) within the U.S. Department of the Treasury, and other interested parties.

Findings

I. Overview

This report reviews the status of the current law, addresses the issues and concerns presented by *Granholm* and *Bainbridge* decisions, and makes recommendations. It also reviews the advantages and disadvantages of direct shipment as presented by its proponents and opponents.

The opponents of direct shipment assert the following potential disadvantages of direct shipment:

- Minors would have greater access to alcoholic beverages;
- It would hurt the three-tier alcoholic beverage distribution system;
- It would facilitate avoidance of applicable state sales and excise taxes; and
- It would have a negative financial impact on the state's retail vendors.

The advocates of legal direct shipment of wine assert the following benefits:

- Consumers may be able to purchase wines that are not available locally;
- Consumers are given more selections of products and have greater access to the products; and
- Consumers may be able to save money by purchasing wines over the Internet.

In addition to these purported benefits, advocates of direct shipping assert that the state's interests in prohibiting sales to minors and collecting applicable taxes can be adequately addressed through regulation.

The *Granholm* decision and *Bainbridge* court's injunction of the enforcement of ss. 561.54 and 561.545, F.S., present two options regarding the continued legality of direct shipping of wines into Florida:

1. The Legislature could prohibit the direct shipping of wine, and eliminate the ability of in-state wine manufacturers to sell wine directly to Florida consumers. This option would eliminate any disparate treatment between in-state and out-of-state wineries; or
2. The Legislature could continue to permit the legal direct shipment of wine and regulate the practice for out-of-state wine manufacturers, while maintaining the ability of in-state wine manufacturers to sell wine directly to consumers. Any limits or regulations imposed on out-of-state manufacturers could be no greater than the requirements imposed on in-

state manufacturers. The regulatory scheme could not pose a practical barrier to out-of-state manufacturers.

II. Legal Status of the Direct Shipment Prohibition

There is some uncertainty regarding the extent to which it is currently legal to direct ship wines and other alcoholic beverages into Florida, and legislative clarification is required to resolve this uncertainty. Despite the *Bainbridge* injunction of ss. 561.54(1)-(2) and 561.545(1), F.S., other current statutes may continue to bar the practice.

The *Bainbridge* court only addressed the constitutionality of the prohibitions in ss. 561.54(1)-(2) and 561.545(1), F.S. The *Bainbridge* final order did not address the constitutionality of the following provisions in the Beverage Law which may be inconsistent with legal direct shipment:

- Section 562.12, F.S., provides that it is a second degree misdemeanor to sell alcoholic beverage without a license.
- Section 561.17, F.S., requires that a person must be licensed “before engaging in the business of manufacturing, bottling, distributing, selling, or in any way dealing in alcoholic beverages.” Arguably an out-of-state direct shipper could not legally direct ship alcoholic beverages into Florida without first obtaining a license from the division.
- Section 561.57, F.S., prohibits vendors from making deliveries away from their places for business of sales actually made at the licensed place of business, but deliveries by a manufacturer, distributor, or vendor away from their place of business may be made only in vehicles which are owned or leased by the licensee.
- Section 562.01, F.S., prohibits the owning, sale, possession, distribution, or storage of any alcoholic beverages unless the person has fully complied with the beverage laws relating to payment of excise taxes.

The application of these sections to the direct shipment of wine was not directly challenged in *Bainbridge* case and the court did not enjoin the enforcement of these provisions to bar direct shipment. However, the *Granholm* decision forbids the states from prohibiting direct shipment by out-of-state manufacturers while permitting in-state manufactures to do the same. This is the regulatory scheme in Florida. Therefore, while provisions in Florida law may be applicable to bar direct shipping, these provisions, if applied to bar direct shipping, may be unconstitutional as applied to direct shipments of wine, and may be subject to further court challenges based upon the holding in *Granholm*.

The legal status of direct shipping is also complicated by the vague and imprecise terms used in the *Bainbridge* final order. Based upon the holding in *Granholm*,

the court held that ss. 561.54 and 561.545, F.S., discriminate against out-of-state wineries to the advantage of in-state producers. The final order did not discuss the constitutionality of the direct shipment ban as applied to non-wineries from out-of-state, including out-of-state retailers. However, the critical language in the court's final order enjoined the enforcement of ss. 561.54 and 561.545, F.S., "against out-of-state vendors and producers." It is not clear whether this injunction permits direct shipment by out-of-state wineries and non-wineries, or whether it was the court's intention to limit the application of the injunction to out-of-state wineries. The terms in the injunction are imprecise. The order referenced vendors, but Florida law defines the term vendors to mean a licensed vendor.²⁵ The court did not further define the term. It is not clear whether the court's order is meant to encompass a broader meaning of the term vendor and thereby include unlicensed out-of-state retailers and wineries within the meaning of the term. Florida law also does not define the term "producers" in the context of alcoholic beverages. The court's order may be interpreted as barring the enforcement of ss. 561.54 and 561.545, F.S., against all direct shippers of wine, including out-of-state wine manufacturers and retailers.

According to the DBPR, the *Bainbridge* final order bars the enforcement of ss. 561.54 and 561.545, F.S., against out-of-state wineries. The division is interpreting the court's order as applicable only to out-of-state wine manufacturers.²⁶ The division intends to issue vendor permits to allow out-of-state wine manufacturers that hold all current, valid federal permits to legally direct ship wines to Florida consumers. The division does not intend to issue vendor permits to out-of-state retailers who wish to direct ship wines into the state.

A. Direct Shipment of Beer and Liquor

In *Bainbridge*, the court noted that its order did not address the constitutionality of the prohibitions in ss. 561.54 and 561.545, with respect to other alcoholic beverages, i.e., beer and distilled spirits (liquor). Consequently, the state was not enjoined from enforcing the prohibitions in ss. 561.54 and 561.545, against out-of-state direct shippers of beer and liquor. There are currently no legal challenges to Florida's prohibition against the direct shipment of beer and liquor.

The *Granholm* decision may affect Florida's vendors and distributors of beer and liquor. Section 561.14, F.S., which sets forth the three-tier system, limits vendor and distributor sales and purchases of alcoholic beverages. As noted previously, Florida wine manufacturers can legally sell their alcoholic beverages directly to vendors, but other manufacturers can only sell to licensed distributors.²⁷ A vendor

²⁵ See s. 561.14(3), F.S.

²⁶ See section IV.B. of this report for an explanation of federal permits.

²⁷ See s. 561.14(1), F.S.

(retailer) must purchase from a licensed distributor.²⁸ However, because Florida wineries may distribute any type of alcoholic beverage, the decision in *Granholm* may also be argued to permit all out-of-state alcoholic beverages manufacturers to evade the three-tier system and sell directly to vendors. Because of *Granholm*, it may not be constitutional to prohibit out-of-state manufacturers of beer, wine, or liquor, to sell directly to vendors, and thereby avoid the state's licensed distributors while the state permits its in-state manufacturers to do so.

It is not clear whether the commerce clause concerns that invalidated the prohibition against direct shipment of wine may also be present in regards to the direct shipment of beer. While Florida law prohibits the direct shipment of beer, Florida law also permits certain malt beverage (beer) manufacturers to sell alcohol directly to consumers. However, unlike the exceptions in current law for in-state wine manufacturers, sales by vendors licensed as malt beverage manufactures are limited to sales for consumption on the premises where the beverage is brewed. For, example, s. 561.221(2), F.S., permits beer manufacturers to obtain a vendor's license for the sale of "alcoholic beverages on property consisting of a single complex, which property shall include a brewery and such other structures which promote the brewery and the tourist industry of the state." Section 561.221(3), F.S., also permits a vendor to be licensed as a manufacturer and brew malt beverages at a single location and in an amount which will not exceed 10,000 kegs per year, provided that the beer can only be sold to consumers for consumption on the vendor's licensed premises or on contiguous licensed premises owned by the vendor.

III. Florida Wineries

Florida has a four hundred year old history of growing grapes and wine production. Vineyards and wineries can be found throughout the state.²⁹ According to the division, there are 37 licensed wineries in Florida. There are 14 certified Florida farm wineries.³⁰ Although s. 561.24, F.S., permits wineries to distribute any alcoholic beverage and seven are also licensed as a distributor, the

²⁸ See s. 561.14(3), F.S., provides an exception that permits a vendor, under limited circumstances, to purchase from another vendor, if the vendor is part of a pool buying group.

²⁹ See *History of Wine Making in Florida*, Florida Department of Agriculture and Consumer Services. This document can be found at the department's Internet address located at: http://www.florida-agriculture.com/consumers/wine_history.htm (last visited August 8, 2005).

³⁰ A complete listing of certified Florida Farm Wineries can be found at the Internet address of the Department of Agriculture and Consumer Services located at: http://www.florida-agriculture.com/consumers/wineries_info.htm (last visited August 8, 2005).

division has noted that only one winery has distributed beer in the past, and none are currently distributing anything but wine.

According to industry representatives, Florida wineries have approximately 125 to 154 employees, with an annual payroll of over \$1.5 million. These wineries have over 300,000 annual visitors. Florida wineries pay over \$600,000 in sales taxes, over \$600,000 in excise taxes, and over \$100,000 in local property taxes and licenses.³¹

According to these representatives, the right to conduct direct sales to consumers at Florida vineyards is crucial to the Florida wineries' efforts to overcome the domestic marketplace's prejudice against non-California wines. According to wine manufacturers, direct sales is also crucial to the in-state manufacturers because their wines are less known than wines from other states, which makes it difficult to distribute Florida wines through other distributors. Mail order sales are dependent upon an initial face-to-face sale. According to representatives for Florida wine manufacturers, in-state manufacturers routinely direct ship their wines to consumers in other states after having first introduced the out-of-state consumer to the Florida wine at a Florida winery.

According to Florida wine industry representatives, direct to consumer sales are also crucial to the continued viability of the Florida wineries. Approximately two percent of their sales are made to wholesalers. The bulk of winery sales, approximately 70 percent, are made directly to consumers in face-to-face sales at the winery. An additional 15 to 20 percent of sales are delivered directly to consumers via common carriers.

Florida wine industry representatives oppose the option of eliminating the ability of in-state wine manufacturers to sell wine directly to consumers. They believe that, in addition to reduced sales for the wineries, the state would also lose tax revenue.

Florida wineries oppose the legalization of direct shipping if done in a manner that would harm Florida wineries, e.g., if the out-of-state wineries receive more favorable legal rights than afforded to the Florida wineries. According to Florida wine industry representatives, out-of-state wineries have several economic and legal advantages not shared by Florida wineries. Direct shipment of wine by out-of-state wineries is currently unregulated. Out-of-state direct shippers of wine do not pay sales and excise taxes in Florida,³² do not register their brands,³³ do not

³¹ These estimated amounts are derived from information provided by two Florida wineries that combined constitute approximately 70 percent of the Florida market in terms of tax collections.

³² See discussion below regarding taxation.

³³ See discussion below regarding brand registration.

pay Florida license fees, and are not subject to audits by Florida regulators.³⁴ Each of these requirements adds a cost to Florida wines that the out-of-state direct shipper can currently avoid.

Additionally, certified Florida Farm Wineries have a legal limit to the size of their business; they must produce or sell less than 250,000 gallons of wine annually to be eligible to be certified. Out-of-state direct shippers have no such limit. To be equitable, the Florida wineries argue that the out-of-state wineries should be required to meet the same requirements as their in-state counterparts. It appears that such a gallonage limitation would permit the majority of out-of-state direct shipper to participate in a Florida direct shipment market. For example, according to the Wine Institute, 90 percent of its member wineries produce less than 100,000 gallons a year. According to information provided by another Florida alcoholic beverage industry representative, approximately 95 percent of California wineries produce less than 105,000 gallons a year. However, the remaining five percent of the California wineries produce over 87 percent of the state's wines.

It is an open question whether Florida could limit direct shipper licensure to wineries producing less than 250,000 gallons of wine annually. If both in-state and out-of-state wineries were required to meet this qualification, such a requirement could be considered not be discriminatory. However, such a requirement could be considered as designed specifically to protect in-state interests. In *Granholm*, the court applied the rule that the court must still consider whether a state's regulatory regime "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."³⁵ It is not clear whether an annual gallonage limitation would meet the standard set forth in *Granholm*.

IV. Enforcement of Direct Shipment Limits and Prohibitions

The primary enforcement mechanism for legalized direct shipment is licensure. According to division and industry representatives, licensure submits the direct shippers to the state's jurisdiction, and the threat of license revocation helps ensure compliance with the state's requirements, including tax payments. In *Granholm*, the court stated that tax collection and other regulatory objectives could be achieved by requiring a permit as a condition of direct shipping.³⁶

³⁴ See discussion below regarding record keeping and audit requirements.

³⁵ See *Granholm* at 1890, quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

³⁶ *Granholm* at 1906.

A. Enforcement Audits

In *Granholm*, the court noted that New York could provide adequate safeguards for direct shipping of wine with licensing and self-reporting, because these methods were sufficient for wine distributed through the three-tier system. The court also noted that licensees could be required to submit regular sales reports and remit taxes. The court observed that licensing, reporting, and tax requirements have been used by other states that permit direct shipping and that these states have reported no problems with tax collection.³⁷ The court also noted that this is the approach sanctioned by the National Conference of State Legislatures in their Model Direct Shipping Bill.

However, licensure alone may not be sufficient to ensure compliance. According to division and alcoholic beverage industry representatives, direct shippers should also be subject to the same regulatory requirements that in-state vendors and manufactures are required to comply with. These include requirements to maintain records, permit state authorities to have access to these records, and submit to periodic audits by Florida regulators.

Of particular concern are the costs associated with auditing out-of-state direct shippers for compliance. Apart from the need for additional auditors, audit costs may include travel related costs that are not present for in-state audits. According to the division, although all audits need not be performed at the manufacturer's premises, on-location audits may be more reliable because an on-location auditor can better access the completeness of the records provided by the auditor.

The costs associated with auditing an out-of-state licensee may be addressed through any or all of the following options:

- The out-of-state manufacturer may be required to pay for the cost of these audits.
- The direct shipper could be required to pay all attorney's fees and cost in any action to collect unpaid taxes.
- As an alternative to a division audit, the direct shipper could be required to submit sworn reports from a certified public accountant.
- Proponents of direct shipping have noted that access to records can be proved in a more cost effective manner if provided electronically via the Internet or other technological means.

In-state wine manufacturers have stated that they do not want to assume the additional cost of paying for state audits because other alcoholic beverage licensees in Florida are not required by law to assume such costs. It is an open

³⁷ See *Granholm* at 1906.

question whether out-of-state manufacturers can be required to pay for the costs of such audits while their in-state counterparts are not required to assume such costs. As stated previously, *Granholm* requires that a state's regulatory regime must advance "a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives,"³⁸ Arguably, costs related to regulating out-of-state manufacturers "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."

B. Enforcement under Federal Law

As an enforcement mechanism, licensure may be effective for persons who seek to legally direct ship into the state through the state's regulatory scheme. However, other mechanisms are needed to enforce compliance by persons who choose to evade the state's direct shipment requirements. These may include persons who may not qualify to be legal direct shippers or persons who may qualify but choose to evade those requirements. These enforcement mechanisms are also relevant if all direct shipments of alcohol were made illegal.

1. Revocation or Suspension of Federal Permits

In *Granholm*, the court noted that Michigan and New York benefit from federal law provisions that give wine manufacturers further incentives to comply with state regulations. The court noted that the Alcohol and Tobacco Tax and Trade Bureau (Tax and Trade Bureau or bureau) within the U.S. Department of the Treasury (formerly the Bureau of Alcohol, Tobacco, and Firearms) may revoke a winery's federal license, which a winery needs to operate in any state, if it violates state law.

The Federal Alcohol Administration Act (FAA Act) requires a basic permit issued by the Tax and Trade Bureau to engage in the business of importing into the United States distilled spirits, wine, or malt beverages. A basic permit is required to engage in the business of distilling spirits or producing wine, and for persons who engage in the business of purchasing for resale at wholesale distilled spirits, wine or malt beverages.³⁹ Retailers and beer manufacturers (brewers) are not required to obtain a basic permit under the FAA Act.

In 2000, the bureau issued a ruling regarding whether direct shipment violated the Web-Kenyon Act,⁴⁰ and about the circumstances under which the bureau would

³⁸ See *Granholm* at 1890, quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

³⁹ See Federal Alcohol Administration Act, codified at 27 U.S.C. s. 203.

⁴⁰ See n. 13, *supra*.

take enforcement action. The bureau ruled that its basic permits are conditioned upon compliance with state laws, the Twenty-first Amendment, and other federal laws related to enforcement, and that it may suspend or revoke the basic permit for violations of state laws. The bureau stated that it “could under appropriate circumstances take administrative action against a basic permit where a basic permittee ships alcoholic beverages into a State in violation of the laws of that State.”⁴¹ According to the bureau’s ruling, it will intervene when it determines that a basic permittee located outside of a state is engaged in actions that are having a “continuing, material, adverse impact upon a State.”⁴²

The bureau’s authority does not extend to direct shippers who are retailers and are not wine manufacturers, distillers, or importers. The bureau’s ruling notes that it is not authorized to regulate the interstate conduct of an out-of-state retailer who is direct shipping.⁴³

The threat of federal permit revocation may have a deterrent affect on a federally-permitted wine manufacturer, liquor distiller, or beer, wine, or liquor wholesaler who may seek to illegally direct ship its products into Florida, but an out-of-state retailer would face no such deterrent. The representative for the plaintiff consumers and wine manufacturers in *Bainbridge* assert that there are more wine manufactures who conduct direct sales than there are direct shipment retailers. Staff has reviewed marketing materials from various direct shippers, including wine and beer direct shippers. It appears that a significant number of direct shippers are retailers and not manufacturers.

According to Tax and Trade Bureau representatives, the bureau is not aware of any instances in which it has sought to revoke or discipline a wine manufacturer’s federal permit for violations of state law. According to the bureau’s representative, the bureau’s practice is to first attempt to obtain the voluntary compliance of the federal permitholder before attempting to discipline the person.

2. Court Injunctions Against Direct Shippers

Because the potential deterrent of losing a federal permit is not applicable to persons who are not required to hold a federal alcohol permit, including retailers and brewers, and because such a threat may not discourage all such federal permit holders, the state may need to enforce any direct shipment limitations or

⁴¹ See AFT Ruling 2001-1, *Direct Shipment Sales of Alcoholic Beverages*, Bureau of Alcohol, Tobacco and Firearms (currently Alcohol and Tobacco Tax and Trade Bureau). A copy may be found at:<http://www.ttb.gov/alcohol/info/revrule/rules/2000-1.htm>. (Last visited September 15, 2005.)

⁴² *Id.*

⁴³ *Id.*

prohibitions in court. However, as discussed below, court enforcement may also be problematic because of limits to the courts' jurisdiction.

a. Personal Jurisdiction Concerns

The ability of the state to enforce direct shipping restrictions against out-of-state persons in court may be limited by the doctrine of *in personam* jurisdiction, also known as personal jurisdiction. This legal doctrine requires that a court must have a legal basis to exercise jurisdiction over a person. Florida residents and Florida-based businesses clearly fall within the jurisdiction of the state's courts, including the federal courts located in Florida, but out-of-state persons, including most direct shippers, may not. Florida's state and federal courts have jurisdiction over a non-resident only if there are sufficient jurisdictional facts for the court to exercise its jurisdiction.⁴⁴ The court's exercise of jurisdiction also cannot violate due process. Due process is satisfied if the defendant has had sufficient "minimum contacts" with the state and maintenance of the suit is reasonable, and does not violate "traditional notions of fair play and substantial justice."⁴⁵

In addition to due process concerns, the defendant's acts must also satisfy the state's long-arm statute in s. 48.193, F.S., which sets forth the acts that could subject a non-resident to the jurisdiction of the state's courts, including the federal courts. In pertinent part, these acts include "operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state."⁴⁶ The courts have generally held that a non-resident operates or engages in a business in this state if he or she engages in a course of business activity in Florida for pecuniary gain, and has engaged in regular business dealings.⁴⁷

Based upon a review of the relevant jurisdictional case law, it is not clear to what extent a state or federal court would have jurisdiction over an out-of-state direct shipper. In *Department of Business and Professional Regulation v. Sam's Wines and Liquors*,⁴⁸ the Circuit Court for the Second Judicial Circuit in Leon County dismissed the state's complaint against an out-of-state direct shipper of wines because the state had failed to allege sufficient facts to bring the out-of-state

⁴⁴ A detailed discussion of personal jurisdiction issues can be found at Philip J. Padovano, *Florida Civil Procedure*, Vol. 5, 2004-2005 Edition, (West's Florida Practice Series), sections 1.2 and 8.7.

⁴⁵ *Int'l Shoe Co. v. State of Washington, Office of Unemployment Compensation & Placement*, 326 U.S. 310, 316 (1945).

⁴⁶ See s. 48.193(1)(a), F.S.

⁴⁷ See *Homeway Furniture Co. of Mount Airy, Inc. v. Horne*, 822 So.2d 533 (Fla. 2nd DCA 2002).

⁴⁸ *Department of Business and Professional Regulation v. Sam's Wines and Liquors*, No. 96-3602, (M.D. Fla. September 3, 1997), *affirmed* 731 So.2d 655 (Fla. 1st DCA 1999).

defendant within the Florida court's jurisdiction. The direct shipper had done approximately \$3,500 in business in Florida, it had advertised in national wine publications and in a newsletter directed towards South Africans living in the United States, and it once purchased an advertisement in a newsletter published by South Africans living in Florida. In its investigation, the division purchased two bottles of scotch paid by a credit card transaction in which the title passed in Illinois, and three bottles of wine in a credit card transaction in which title passed in California, i.e., the sales did not occur in Florida but occurred in Illinois and California, respectively.

In *Butler v. Beer Across America*,⁴⁹ an Alabama federal district court dismissed a law suit by the parent of an under-aged son who had purchased beer over the Internet from the defendant. This court also found a lack of personal jurisdiction over the Illinois defendant.

However, in *Nixon v. Beer Nuts, Ltd.*,⁵⁰ a Missouri court found that it could exercise personal jurisdiction over a North Carolina beer direct shipper who had sent beer to an 18 year-old minor. The minor was an intern working for the state's attorney general. The direct shipper was a North Carolina corporation, and a licensed alcoholic beverage retailer in North Carolina. It advertised in various national media, including the Internet, for its beer-of-the-month-club memberships. It accepted orders for its memberships and beer sales by mail, fax, and the Internet, and had delivered thousands of bottles of beer to hundreds of Missouri residents. In addition to finding that the court had personal jurisdiction over the out-of-state defendant, the Missouri court also held, based in part on the Twenty-first Amendment, that the direct shipper had violated Missouri's alcoholic beverage laws and had violated the state's unfair trade practices act by failing to disclose to Missouri consumers that its sales and deliveries to Missouri consumers violated Missouri law.

b. Federal Subject Matter Jurisdiction Concerns

In *Granholm*, the Supreme Court did not address the issue of personal jurisdiction but stated that the Twenty-first Amendment gives state attorneys general the power to sue wineries in federal court to enjoin violations of state law. However, historically the Twenty-first Amendment was not considered as granting states the right to sue persons in federal court for violations of state laws. In *Florida Department of Business Regulation v. Zachy's Wine and Liquor*,⁵¹ the State of Florida sought to enjoin three out-of-state wine manufacturers from shipping wines into Florida in violation of state law. The U.S. District Court for the

⁴⁹ 83 F.Supp.2d 1261 (N.D. Alabama 2000).

⁵⁰ 29 S.W.3d 828(Mo. Ct. App. 2000).

⁵¹ *Florida Department of Business Regulation v. Zachy's Wine and Liquor*, 125 F.3d 1399 (11th Cir. 1997).

Northern District of Florida dismissed the state's complaint for lack of subject matter jurisdiction. The U.S. Court of Appeals for the Eleventh Circuit affirmed the lower court's dismissal and held that the Twenty-first Amendment and the Webb-Kenyon Act do not give states a cause of action to enjoin the wine manufacturers who were alleged to be importing wine in violation of Florida law.

Subsequent to the *Zachy*'s decision, the Congress enacted the Twenty-first Amendment Enforcement Act,⁵² which provides the federal district courts with jurisdiction over any action brought by a state attorney general against a person who is engaged in, or has engaged in, the illegal transportation of alcoholic beverages into the state.⁵³ The act authorizes the state attorneys general to seek injunctive relief to restrain the person from engaging, or continuing to engage, in the violation, and to enjoin the person to comply with state law. The act also prohibits the direct shipment of wine into a state in violation of state laws.⁵⁴ There are no reported cases in which a state attorney general has invoked the act.

V. Sale or delivery of Alcoholic Beverage to Persons Less Than 21 Years of Age

Opponents of direct shipping have expressed concerns that direct shipping of wines, or other alcoholic beverages, may facilitate access to alcoholic beverages by persons less than 21 years of age.⁵⁵ This has been identified as the number one concern of the state's retail vendors and of advocates against under age alcohol and drug use.

It is unclear whether, or to what extent, direct shipping may affect minors' access to alcohol. To date, there are no studies that show a link between direct shipping and an increased risk of delivery or sales of alcoholic beverages to minors. Most instances in which alcohol purchases are made via mail order or the Internet by minors, or in which deliveries by common carrier are made to minors, have involved investigations, or sting operations, conducted by state regulators.⁵⁶ The representative for the Florida Coalition to Prevent Underage Drinking also stated

⁵² 27 U.S.C. s. 122a. This act became law on January 16, 2001.

⁵³ *See also* 27 U.S.C. s. 124, which prohibits the direct shipment of wine into a state in violation of state laws and also authorizes the states' attorneys general to bring a civil action.

⁵⁴ This provision was enacted on November 2, 2002.

⁵⁵ Section 562.11, F.S., provides that it is unlawful for any person to sell, give, serve, or permit to be served alcoholic beverages to a person under 21 years of age. A violation of this prohibition is a misdemeanor of the second degree.

⁵⁶ For example, in early 2005, a 20 year-old university student ordered wine and tequila over the Internet at the behest of Florida's Attorney General's Office. *See* Alisa Ulferts, "Crist Sides With Retailers on Mail-Order Alcohol Law," *St. Petersburg Times*, February 2, 2005, 1B.

that several television news services have made similar investigative efforts. There is no evidence that such violations tend to occur outside of these controlled circumstances.

States that permit direct shipment have generally reported few or no problems with shipments to minors. A 2003 study by the Federal Trade Commission found that the 26 states allowing direct shipments reported no problems with minors' increased access to wine.⁵⁷ In *Granholm*, the Court noted the FTC study, and added that this study's findings were not surprising because "minors are less likely to consume wine, as opposed to beer, wine coolers, and hard liquor."⁵⁸ The Supreme Court also noted that minors who decide to disobey the law have more direct means to do so, and that direct shipment is an "imperfect avenue" by which minors can get alcohol because they "want instant gratification."

From 1996 through 1998, the Division of Alcoholic Beverage and Tobacco investigated complaints from vendors, distributors, and consumers regarding the direct shipping of alcoholic beverages from out-of-state persons to consumers in Florida. These investigations resulted in the division's issuance of Notices to Show Cause to 16 companies, including three common carriers. None of the sales in these investigations involved sales to minors.⁵⁹

Opponents of direct shipping assert that the practice presents a genuine threat to underage alcohol access. They assert that minors are resourceful, particularly when they are told that they cannot do something. They further assert that minors may be attracted to the challenge of obtaining alcohol from direct shippers, and that increased and more readily available direct shipment options may increase the current prospects of minors obtaining alcohol through direct shippers.

A. Age Verification Methods and Shipping Requirements

While, opponents of direct shipping assert that the practice enables minors to get access to alcoholic beverages, the proponents of direct shipping assert that direct shippers can take, and are willing to take, measures to ensure that direct shipped alcohol does not make it into the hands of persons not legally authorized to possess alcoholic beverages.

⁵⁷ See *Possible Anticompetitive Barriers to E-Commerce: Wine*, Federal Trade Commission (July 2003).

⁵⁸ See *Granholm* at 1905.

⁵⁹ The United States District court for the Middle District of Florida issued a stay in the enforcement of s. 561.54, F.S., thereby precluding any subsequent investigations. The division has been awaiting the conclusion of the *Bainbridge* case before pursuing any further investigations.

The measures designed to avoid direct shipping alcohol to minors address the issue when the sale is made (point of sale) or when the actual delivery is made (point of delivery).⁶⁰ Point of sale measures involve commercial services designed to confirm the identity and age of the person making a particular purchase via telephone, mail order, or the Internet. These services utilize public and private credit records and various public databases, including state employment, license records, court records, and driver's license records, to confirm age and identity. There are also non-credit-based age verification services that use independently issued identification codes.

Point of delivery age verification requires that an adult provide proof of age with valid photographic identification at the time the delivery is made. The proof of age at the point of delivery may be required of the person who made the purchase, the person accepting the delivery, or both. The Model Direct Shipment Bill proposed by the Wine Institute requires that containers of alcoholic beverages shipped directly into a state must be conspicuously labeled with the words: "Contains Alcohol: Signature of Person Age 21 or Older Required for Delivery." States that have legalized direct shipping have required similar container labeling. For example, New York, which legalized direct shipping in 2005, requires a conspicuous label with the words: "Contains Wine – Signature of Person Age 21 or Older Required for Delivery – Not for Resale." New York, like other states that have legalized direct shipping, requires point of delivery age verification, however, the recipient of the delivery does not have to be the person who made the purchase.⁶¹

Direct shipping proponents and representatives for Florida wine manufacturers expressed concerns that point of sale age verification requirements impose additional, unreasonable costs to transactions, and that point of delivery measures should sufficiently address the concern. They also note that not all wineries have the technological systems needed to utilize these services. The division recommends that direct shippers should be required to verify the age of the recipient prior to shipment. Representatives for Florida vendors also recommend point of sale age verification.

⁶⁰ For a detailed discussion of age verification systems see: *Final Report of the COPA Commission Presented to Congress*, Commission on Online Child Protection, October 20, 2000. A copy of the report is available at <http://www.copacommission.org/report> (last visited August 11, 2005).

⁶¹ See s. 79-c, N. Y. Alco. Bev. Cont. Law Ann.

B. Common Carrier Requirements and Concerns

It is illegal to use the U.S. Mail to deliver alcoholic beverages.⁶² Consequently, direct shipments of alcoholic beverages must be made by use of the direct shipper's own vehicles or by common carriers. Use of a direct shipper's own vehicles may be impractical in the context of interstate shipments. States that have legalized direct shipping have imposed specific requirements on the common carriers that make the deliveries. For example, New York requires that the common carrier require that the recipient provide proof of age, and that the recipient sign an acknowledgment of receipt. The common carrier must also refuse delivery if the recipient refuses to provide proof of age.

Representatives for two major common carriers advised that it is insufficient to impose labeling requirements on the direct shippers. The direct shippers should be required to use the age verification services provided by the common carriers. According to the common carriers, they routinely ship products that require proof of age by the delivery recipient, e.g., firearms, medications, and adult materials. Common carriers use their own labels to indicate whether proof of legal age must be presented at the point of delivery. Common carriers also provide age or identity verification as a delivery option or service to their customers. The common carrier's drivers and other personnel are only trained to recognize their own labels because the labels placed on packages by the common carrier's customer, i.e., the direct shipper, may vary in size, format, and location of placement. They do not request age verification at the point of delivery unless the customer has paid for that service.

The common carriers expressed their concern with label requirements that are too specific. Because many states impose labeling requirements on direct shipments, each state may have a different notice requirement for the label. A common carrier representative recommended that the state's labeling requirement should provide a general requirement for a notice that shipment contains alcoholic beverages and that proof of being over the age of 21 is required, but the statute should not specify the form and words used on the label.

The common carriers also expressed concern regarding the exposure of their delivery persons to criminal penalties if they deliver an alcoholic beverage to a person less than 21 years of age. If the package delivered contains an alcoholic beverage and the package is clearly labeled as containing an alcoholic beverage, the common carrier's delivery person may be subject to arrest under s. 562.11,

⁶² 18 U.S.C. s. 1716(f) provides that "all spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind are nonmailable and shall not be deposited in or carried through the mails."

F.S., for giving an alcoholic beverage to a person under 21 years of age. A common carrier expressed the concern that their delivery persons should not be subject to criminal liability in the event a delivery is made to a person under the age of 21. According to the common carriers, market pressures should be sufficient to ensure compliance because it is in the common carriers' interest to comply with the directions of their customers and to provide the service that they have contracted to provide. If a customer contracts with the common carrier to provide delivery only to a person over the age of 21, then the common carrier will dutifully provide that service.

It is not clear how a direct shipper, who may be located in another state and has no physical contact with the delivery recipient, could be held criminally liable for a delivery made by a common carrier's delivery person, particularly if the package is clearly labeled as containing an alcoholic beverage and specifies that proof of legal age is required.

Representatives for Florida's alcoholic beverage retailers believe that direct shippers and common carriers should be held to the same standards as Florida retailers. They argue that under current law Florida retailers and their sales clerks and servers are subject to arrest and criminal penalties if they serve or give alcohol to a person under 21 years of age. They argue that the prospect of arrest and criminal sanctions deters under age sales, and that a similar deterrent should remain applicable in the context of direct shipping.

VI. Tax Collection

Section 561.545, F.S., provides the Legislative finding that the direct shipment of alcoholic beverages into Florida from out-of-state poses a serious threat to state revenue collections. Florida alcoholic beverage industry representatives maintain that direct shipment of alcoholic beverages results in lost tax revenue to the state, and that, if legalized, direct shippers should be required to pay all of the taxes that are applicable to other legal alcoholic beverages sales in this state. Wine sales in Florida are subject to two forms of taxation: the excise tax on wine and the sales tax.

A. Excise Tax on Wine

Section 564.06, F.S., imposes an excise tax on wines. Section 562.01, F.S., prohibits the owning, sale, possession, distribution, or storage of any alcoholic beverages unless the person has fully complied with the beverage laws relating to payment of excise taxes.⁶³ The rate of the tax is based on the alcohol content of

⁶³ Section 562.16, F.S., also prohibits the possession of untaxed alcoholic beverages. It provides an exception for possession of less than one gallon of alcoholic beverages when

the wine, sparkling wine, or cider. The tax rate ranges from \$.89 per gallon for cider containing less than seven percent of alcohol by volume to \$3.00 per gallon for wines containing more than 17.259 percent alcohol by gallon. The tax rate for wines containing less than 17.259 percent alcohol by volume is \$2.25 per gallon. The excise taxes on wine are collected by the distributor and paid to the division monthly.⁶⁴

The Wine Institute, a national proponent of direct shipping, projects approximately \$1,229,075 in potential annual excise tax revenue from the direct shipping of wines into Florida.⁶⁵

As surety for the payment of taxes, s. 561.37, F.S., requires that each distributor and manufacturer secure a bond acceptable to the division. The required bond for a wine manufacturer is \$5,000. Florida wineries that are licensed as distributors must also secure a bond in the amount of \$25,000. The division has the discretion of approving a lesser bond, but the bond may not be less than \$10,000. Florida law does not provide a bond for vendor sales because the state's three-tier system requires tax collection by the distributor.

In order to comply with *Granholm* and *Bainbridge*, a bond requirement for out-of-state direct shippers must not be greater than any bond requirement for in-state direct shippers. The division recommends that a surety bond in the amount of \$15,000 to \$25,000 would be a sufficient surety for payment of taxes by out-of-state direct shippers of wine. Florida wine manufacturers have expressed the concern that a \$25,000 surety bond may be too high. Florida manufacturers have further expressed the concern that any bond requirement for out-of-state direct shippers should be equitable and not less than any requirement imposed on their in-state counterparts.

B. Sales and Use Taxes

Alcoholic beverages are also subject to the six percent sales tax imposed by s. 212.06, F.S. Section 212.0596, F.S., also imposes a sales tax on mail order purchases if the dealer has met the minimum contacts with the state set forth in that section.

purchased by the possessor out-of-state in accordance with the laws of the state where purchased and brought into the state by the possessor. This provision does not specify whether the consumer can personally ship into the state by common carrier the beverages that the consumer purchased out-of-state.

⁶⁴ Section 564.06(7), F.S.

⁶⁵ According to the Wine Institute, its projection is derived from existing sales and license registration numbers from New Hampshire, which, the Institute asserts, has the most complete records of a direct-to-consumer wine permit state.

In *Quill v. North Dakota*, 504 U.S. 298 (1992), the U.S. Supreme Court held that, based on a Commerce Clause analysis, there must be a sufficient connection between a state and a retailer before the state can impose a tax. A tax can pass constitutional muster only if the activity has a substantial nexus with the taxing state. It is unclear whether the Twenty-first Amendment of the U.S. Constitution, which prohibits the importation of alcoholic beverages into a state in violation of that state's laws, would alter the Commerce Clause analysis to exempt alcoholic beverages from the nexus requirement. However, licensure of out-of-state direct shippers may constitute a sufficient nexus to permit the state's taxation of sales made into Florida from out-of-state.

If the sales tax is not collected from the retailer, s. 212.06(8), F.S., imposes a use tax on purchases made outside of Florida by mail order catalog, through the Internet, or otherwise. The use tax is paid by the Florida consumer.⁶⁶

The Wine Institute projects approximately \$5,042,100 in potential annual sales tax revenue from the direct shipping of wines into Florida per 500 direct shipping licensees and using the current excise tax rate of \$2.25 per gallon.⁶⁷ The division, in its analysis of SB 906, estimated excise tax revenue of approximately \$427,950 based on an estimated 60,000 consumers purchasing 12 bottles of wine per year.

C. Brand Registration

Section 564.045, F.S., requires registration of wine brands for the purpose of tax revenue control. Before being shipped, sold, or offered for sale to a distributor or importer in Florida, a wine brand must be registered by the brand's "primary American source of supply," which s. 564.045(1), F.S., defines as the:

manufacturer, vintner, winery, or bottler, or their legally authorized exclusive agent, who, if the product cannot be secured directly from the manufacturer by an American distributor, is the source closest to the manufacturer in the channel of commerce from whom the product can be secured by an American distributor, or who, if the product can be secured directly from the manufacturer by an American distributor, is the manufacturer. It shall also include any applicant who directly purchases vinous beverages from a manufacturer, vintner, winery, or bottler who represents that there is

⁶⁶ The use tax is paid to the Florida Department of Revenue with form no. ABL-571. The form and instructions can be found at the department's website at: <http://sun6.dms.state.fl.us/dor/consumer/> (lasted visited August 10, 2005).

⁶⁷ See n. 65, *supra*.

no primary American source of supply for the brand and such applicant must petition the division for approval of licensure.

The annual license fee for each brand is \$15. All Florida wineries that conduct direct sales to consumers must register the brands they sell and pay the fee for each brand. According to the Wine Institute, some states require brands and labels to be registered before shipping those brands to consumers in the state. Currently, s. 564.045, F.S., does not require brand registration for out-of-state state direct shipment because Florida law does not provide for the legality of such shipments. According to Florida alcoholic beverage industry representatives, to be equitable, direct shippers should also be required to comply with a brand registration requirement if out-of-state wine manufacturers are permitted to direct ship into Florida.

VII. License Fees

Under the Beverage Law, Florida wine manufacturers may pay a state license tax for a manufacture's license, distributor's license, and a vendor's license. Section 564.02(2)(a), F.S., imposes a license tax of \$1,000 for a license to engage in the manufacturing or bottling of wines and nothing else. Section 561.02(2)(b), F.S., imposes a license tax of \$1,250 to distribute wines, malt beverages, and fortified wines. Section 564.02(1), imposes the license taxes for vendors who sell wine.

Vendor licenses are divided into two types: vendors operating a business where beverages are sold for consumption on the premises, and vendors operating a business where beverages are sold only for consumption off the premises. The vendor license tax for consumption off the premises is equal to 50 percent of the license tax for the applicable vendor's license for consumption on the premises. The license tax for consumption on the premises is dependent on the population size of the county where the vendor's premises is located. These license taxes range from \$120 for counties having a population of less than 25,000 to \$280 for counties having a population of over 100,000. According to industry representatives, some wine manufacturers have a consumption on the premises license for sales and wine tastings at the winery.

In regards to direct shipment, a vendor's license for sales limited to consumption off premises would appear to be the relevant license and tax. Such a license tax ranges from \$60 to \$140. If licensed as a vendor, a manufacturer would also be subject to the annual surtax imposed by s. 564.025, F.S., which is equal to 40 percent of the license fee for each wine vendor, regardless of the wine's alcoholic content.

Representatives for in-state wine manufacturers and vendors have stated that they are concerned that out-of-state direct shippers do not pay for a Florida license. If

direct shipment were legalized, these representatives believe that the out-of-state direct shippers should be required to pay the same license fees required of the in-state vendors.

VIII. Other Limitations on Direct Shipment

A. Limiting Who Can Direct Ship

As noted previously, a review of various Internet wine merchants and brochures for mail-order wine reveals that many of these direct shippers do not appear to be wine manufacturers, but are third party retailers who sell wines from several manufacturers. Wines from these third party merchants are widely available. For example, wines may be purchased through the Internet merchant Amazon.com, which, in association with the Internet retailer Wine.com, advises on its website that it currently ships wines “to most locations in Florida.”⁶⁸

Some states limit licenses or permits for direct shipment of wines to wine manufacturers. For example, Texas requires that an out-of-state winery direct shipper’s permit may only be issued to a person who “operates a winery located in the United States and holds all state and federal permits necessary to operate the winery, including the federal winemaker’s and blender’s permit.”⁶⁹ Some states do not limit direct shipments to wine manufacturers. Virginia permits out-of-state non-manufacturers to obtain a “shipper’s permit” to direct ship wines into the state.⁷⁰

According to industry representatives, if legalized, Florida should limit direct shipment licensure to wine manufacturers. Representatives for Florida wineries, distributors, and, retailers are concerned that permitting non-wine manufacturers to direct ship would erode the state’s three-tier system. Permitting non-manufacturers to direct ship wines into Florida would exceed what is required by the holding in *Granholm*. The holding in *Granholm* prohibits states from barring out-of-state manufacturers from shipping wines directly to its consumers where the state permits its in-state manufactures to do so. *Granholm* does not require that the state also permit other non-manufacturers to direct ship wines.

The Beverage Law also limits who can be licensed to sell or distribute alcoholic beverages by imposing alcoholic beverage license qualification requirements. Section 561.15, F.S., requires that alcoholic beverage licensees must be of good moral character and not less than 21 years of age.⁷¹ The Beverage Law also

⁶⁸ See <http://www.wine.com> (last visited August 31, 2005).

⁶⁹ See s. 16.09, Texas Alcoholic Beverage Code.

⁷⁰ See s. 4.1-112.1, Code of Virginia.

⁷¹ See s. 561.15(1), F.S.

prohibits persons with certain criminal records from being licensed. For example, persons convicted within the past five years of any offense against the beverage laws of this state, the United States, or any other state cannot be licensed. Additionally, persons convicted of any felony within the past 15 years in this state, the United States, or any other state also cannot be licensed.⁷² License applicants must also submit fingerprints and are subject to criminal background checks.⁷³

Florida alcoholic beverage industry representatives assert that, if licensed to conduct direct shipment sales into this state, Florida-licensed out-of-state direct shippers should be required to meet the same licensure requirements as Florida-based licensees.

B. Limiting Direct Shipments for Consumer Use

Representatives for the distributors expressed the concern that legalized direct shipment may further damage the three-tier system by permitting licensed vendors to evade the current distribution system by obtaining wines directly from out-of-state manufacturers and suppliers. They argue that, if direct shipment were legalized, the practice should be limited to consumers and licensed vendors should not be permitted to obtain wine outside of the established alcoholic beverages distribution system. Some states prohibit the resale of alcoholic beverages purchased by direct shipment, and limit sales and shipments for personal use. For example, Virginia, which permits direct shipment, provides that sales and shipments must be for personal consumption and not for resale.⁷⁴ Texas provides that its direct shipment permitholders “may ship wines to the ultimate consumer.”⁷⁵

C. Consumer Registration Requirement

SB 480 by Senators Saunders and Dockery and SB 2552 by Senator Geller required that wines could only be shipped to persons who were registered with the division to receive shipments. Both bills provided that a person who illegally obtains wine from a direct shipper commits a second degree misdemeanor. Consumer registration may provide a means to verifying that direct shippers are not exceeding shipping limitations. Alternatively, opponents of consumer registration argue that it is not necessary and that direct shipper reporting requirements should be sufficient to verify compliance. Consumer registration

⁷² See s. 561.15, F.S.

⁷³ See ss. 561.17 and 561.18, F.S.

⁷⁴ See s. 4.1-112.1, Code of Virginia.

⁷⁵ See s. 16.09, Texas Alcoholic Beverage Code.

may also place an additional regulatory burden on sales if the direct shippers are required to verify that the consumer is registered with the state before making the delivery or sale. According to the department, consumer registration would also require additional regulatory costs.

D. Direct Shipping Quantity Limits

Some states limit the quantity of alcoholic beverages that may be direct shipped into the state. New York's recently enacted direct shipment law limits direct shippers to no more than 36 cases (no more than nine liters each case) per year to a resident of the state.⁷⁶ Virginia limits direct shipments to two cases (also no more than nine liters each case) each month to a resident of the state.⁷⁷ Texas limits direct shipments to three gallons within any 30-day period to the same consumer in the state.⁷⁸

According to a representative for two Florida wine manufacturers,⁷⁹ a monthly shipment limit of two to four cases (9 liters or 12 bottles per case) would reduce their sales by less than one percent.

⁷⁶ See s. 79-c, N. Y. Alco. Bev. Cont. Law Ann.

⁷⁷ See s. 4.1-112.1, Code of Virginia.

⁷⁸ See s. 16.09, Texas Alcoholic Beverage Code.

⁷⁹ According to the representative, these two wineries constitute approximately 70 percent of the Florida wineries.

Conclusions and Recommendations.

The *Granholm* decision and the *Bainbridge* court's injunction of the enforcement of ss. 561.54 and 561.545, F.S., present two options regarding the direct shipping of wine into Florida. Unless otherwise indicated, the term direct shipper in these recommendations includes in-state and out-of-state direct shippers.

Should the legislature choose to continue to prohibit all direct shipment of wines into Florida, staff recommends that the Legislature eliminate the ability of in-state wine manufacturers to sell wine directly to consumers. This option would eliminate any unconstitutional disparate treatment between in-state and out-of-state wineries as invalidated by *Granholm*.

Should the Legislature choose to maintain the ability of in-state wine manufacturers to sell wine directly to Florida consumers, staff recommends that the Legislature legalize the direct shipment of wine and regulate the practice. The principal method to regulate direct shipment is to establish licensure requirements for a direct shipper. The Legislature should create a single license classification to license out-of-state and in-state direct shippers of wines, and require licensure as a condition of legal direct shipping. The Legislature should consider the following licensure options:

- Licensure may be limited to persons who operate a winery located in the United States and hold all state and federal permits necessary to operate the winery;
- The Legislature may permit persons operating a winery outside the United States to qualify for licensure;
- In addition, the Legislature may permit non-manufacturers, e.g., out-of-state retailers, to be licensed direct shippers; and
- If the Legislature opts to limit licensed direct shippers to wine manufacturers, it may require that a winery licensed as a direct shipper must produce or sell less than 250,000 gallons of wine annually.

In addition to licensure, the Legislature should consider the following options for regulating direct shipment:

- Require, as a condition of licensure, that out-of-state direct shippers must satisfy all of the minimum license qualification requirements required under the Beverage Law for a Florida alcoholic beverage license;
- Require, as a condition of licensure, that the license holder submit to the jurisdiction of the regulatory agency and the courts of this state in regards to compliance with the laws of this state;
- Limit direct shipment sales to sales for personal consumption, and prohibit the resale at retail of wines purchased directly from a direct shipper;

- Require age verification procedures for the point of delivery, point of sale, or both, that, at minimum, require that an adult provide proof of age with a valid photographic identification at the time the delivery;
- Require that containers of wine shipped directly to consumers must be conspicuously labeled with words that identify them as containing alcohol requiring the signature of a person 21 years of age or older before delivery can be made;
- Impose specific shipping requirements on common carriers, including requiring that the common carrier must require that the recipient of wine provide proof of age, and that the recipient of the wine must sign an acknowledgment of receipt. The common carrier should also be required to refuse delivery if the recipient refuses to provide proof of age;
- Require that direct shippers remit to the state all applicable Florida excise and sales taxes;
- Amend s. 564.045, F.S., to require that direct shippers to register all wine brands before shipping, selling, or offering for sale any wine to a consumer in Florida;
- Require payment of a license fee comparable to the fee required for an in-state wine vendor;
- Require that direct shippers maintain records of sales and shipments of wine into Florida, and require that the direct shippers permit state regulators to have access to these records;
- Require that direct shippers pay all attorney's fees and costs in any action to collect unpaid taxes;
- Require monthly reporting to the Division of Alcoholic Beverage and Tobacco that details all shipment of wine made into Florida, including the number of bottles shipped, to whom the wine was shipped, the identity of the common carrier making the shipment, and the brands shipped.
- Require periodic audits of direct shippers by the division, that all required reports should be signed by a certified public accountant, or both; and
- Require that direct shippers pay all travel related costs necessary to conduct a compliance audit of an out-of-state direct shipper if the state auditor must travel out-of-state to conduct the audit.